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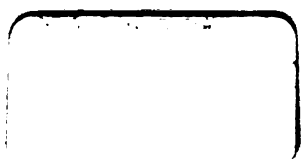
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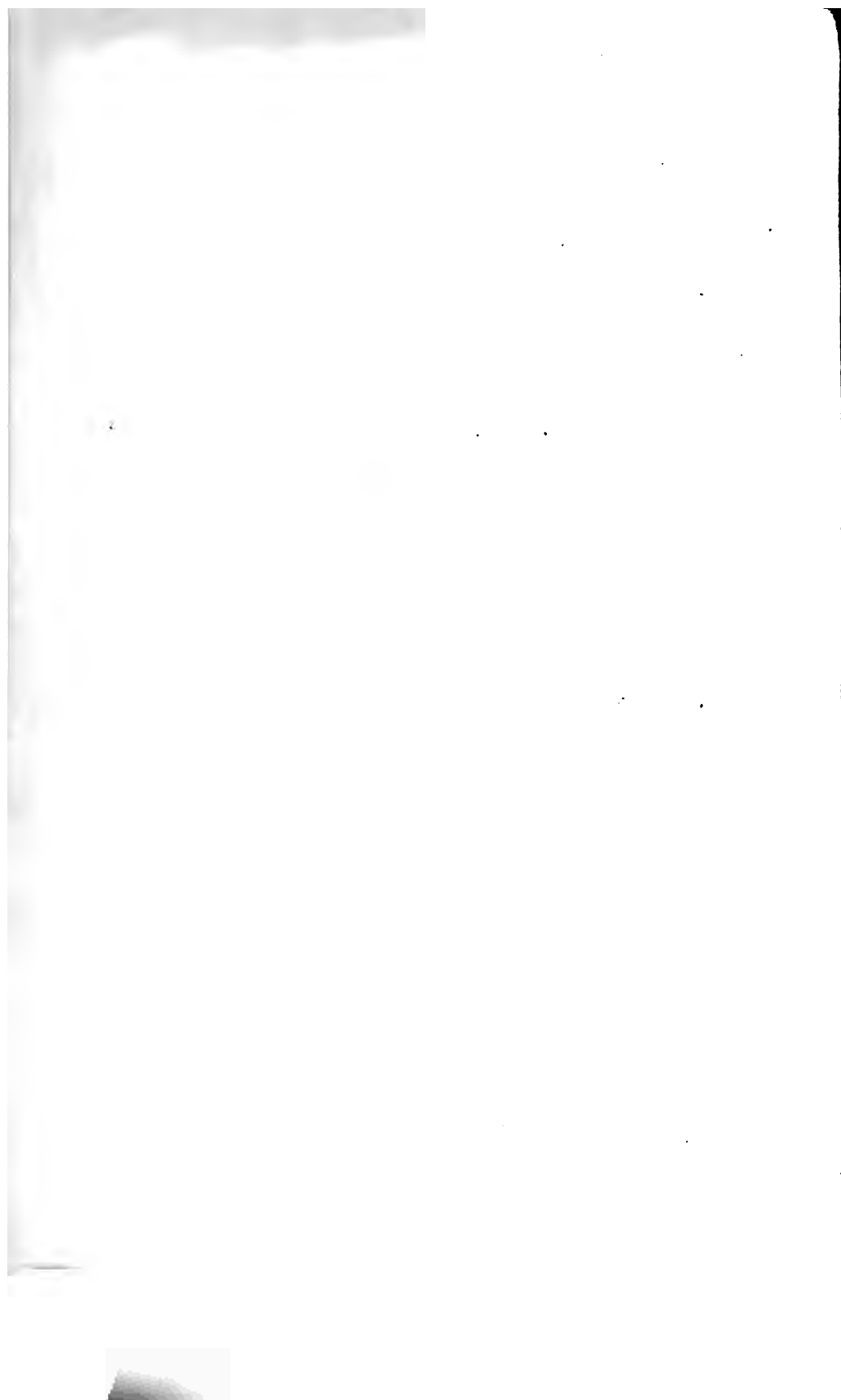
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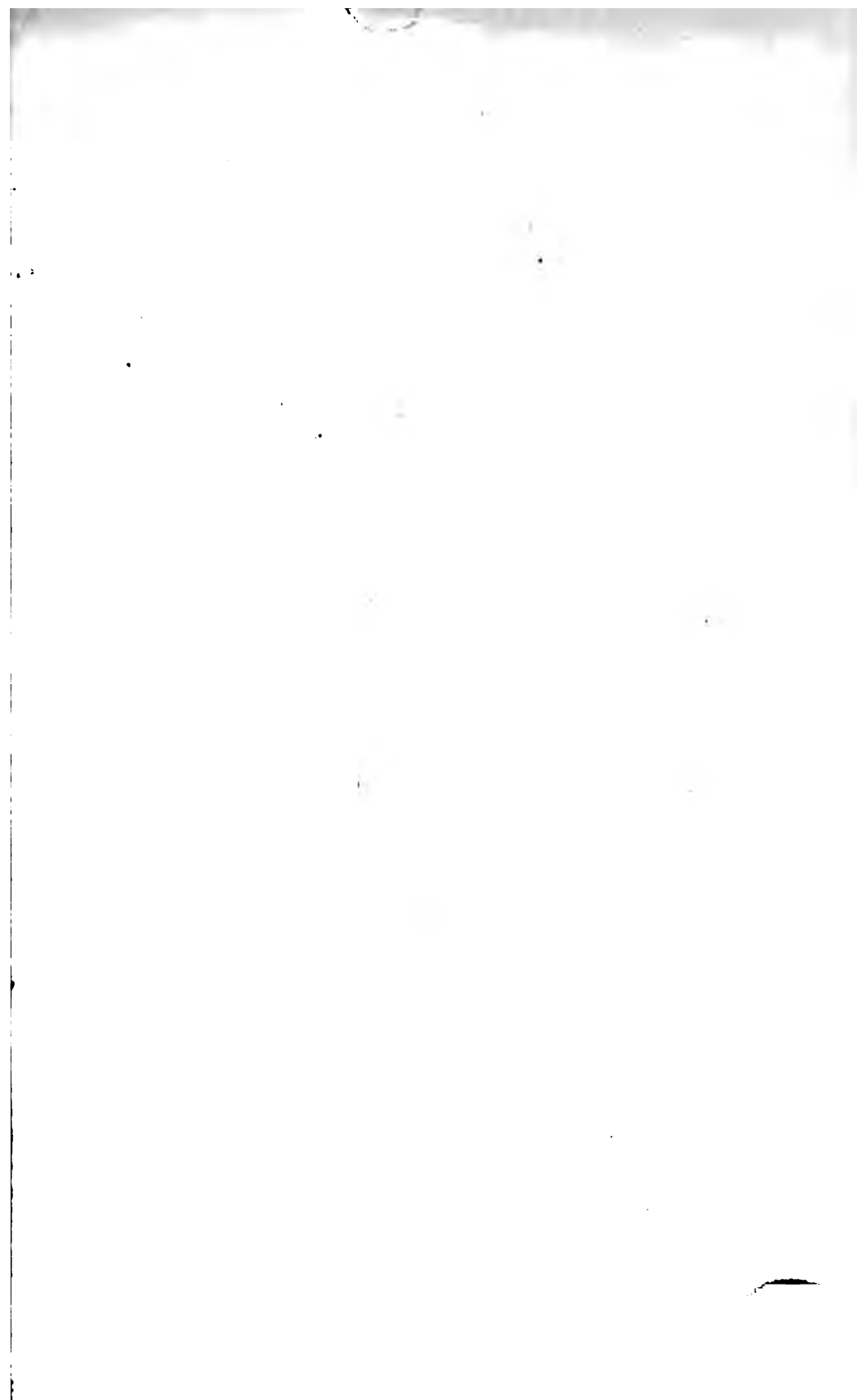
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SELECT CASES
ON
CODE PLEADING

WITH NOTES.

BY

AUSTIN ABBOTT, LL.D.,

Dean of the New York University Law School ; Author of "Trial Evidence,"
"New York Digest," &c.

SECOND EDITION.

Enlarged and Improved, with collation of the most recent cases.

A Pleading is at once a notice to the adversary of what he must prepare to meet ; a rule of order by which the court may restrain the latitude of contention at the trial ; and, after judgment, a record of justice done which the court may enforce and compel the parties to respect.

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P R E F A C E .

In this volume I have selected the best authorities on the New Procedure in Pleading as it is adopted and practically applied in the State of New York. Such parts of a case as had no relation to the question of pleading have been omitted; the omission and its reason being always indicated. An examination of the original records of each case as presented in court has enabled me to prefix to the opinion the actual pleading on which the question arose, and any details of procedure, necessary to show how the question came before the court.

The head notes are prepared especially for this work, and the cases are arranged in a logical order calculated to develop the reader's view of the rules of pleading as a systematic body of consistent principles growing out of the litigation over concrete facts, and I have appended to the cases on some of the more important and frequently occurring classes, notes to aid the application of the same principles to varying states of fact. The classification shows how the application of such principles distributes litigated causes into distinguishable classes, indicated over the top of the pages; and after the general principles have been elucidated in the cases forming the first half of the volume, the technical rules are given which have grown up under judicial experience in the convenient and orderly presentation of facts to the court by means of pleading.

Prefixed to the volume are two tables; one a topical table of all the cases presented in the volume; and one of the requisites or contents of each pleading used under the Code, and the method of taking objections to defects.

The following statement of the object of the rules of pleading (from the "*Brief on the Pleadings*") I repeat here to aid my readers in reviewing the subject in the completed volume.

A pleading is at once a notice to the adversary of what he must prepare to meet; a rule of order to limit contention at

the trial; and, after judgment, a record of justice done to show what it is that the parties are precluded from subsequently contesting.

The rules applicable on demurrer have grown up chiefly in view of the first of these requirements, and turn on the questions: Do the pleadings present a fit question for litigation? and, Do the incidents of parties, jurisdiction, etc., make this a fit occasion?

The rules applicable at the opening of a trial of issues of fact, before going into evidence, assume that the present is a fit occasion, but leave open the inquiries: Whether the pleadings present a question to be tried; and of a nature to be within the jurisdiction of this court? and, Are all indispensable parties before the court? The same stage of proceedings may raise the further questions: What mode of trial do the contents of these pleadings call for? and, In what order shall the parties and issues be heard?

The opening by counsel, and the resulting reception of evidence, introduce such modification of this aspect of the case as is required by the practical construction which the parties, by their contention in the presence of the court, put upon the language in which they have framed the issue.

The court still holds them to questions within the general scope of the pleadings, but disregards technical objections which the objector by his own course has already disregarded.

The course of the trial, proceeding on this relaxation of the original rules, frequently obscures the lines which strict adherence to the pleadings might have preserved; and when the time for submission of the cause arrives, the question whether each party gave his adversary fair notice of the question which they have actually tried has gone by, for each has taken his part in trying it; and the time for applying the rules of order as to the method of trial has also gone by; while the question what sort of judgment can the court properly render, and perpetuate on its record, and enforce by its process, on the foot of these pleadings, comes into prominence.

These distinctions must be borne in mind by whoever would master the modern principles and rules of pleading.

My acknowledgments are due to the Williamson Book Com-

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AUSTIN ABBOTT.

NEW YORK UNIVERSITY,
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NOTE GIVING A GENERAL VIEW OF THE COURSE OF PLEADING UNDER THE CODES.

[The details are for the sake of precision stated here according to the rule in New York; but the practitioner in other jurisdictions can readily adapt the statement in detail where there is diversity.]

CONTENTS OF THE COMPLAINT.

I.—MATTERS SHOWING THE CAUSE PROPERLY BEFORE THE COURT.

1. *Appearance by attorney.* A usual introductory statement, but not essential. Subscription enough, N. Y. Code Civ. Pro., § 417.

2. *Complaint not to depart from the summons;* e. g., as to names of parties, court and county (N. Y. Code Civ. Pro., §§ 417, 481); *Wadsworth v. Georger*, 18 Abb. N. C., 199; *Rector v. Ridgewood Ice Co.*, 38 Hun, 293.

3. *Jurisdiction.* In inferior courts of limited jurisdiction, jurisdictional facts must be alleged. *Gilbert v. York*, 111 N. Y., 544, p. 347 of this vol. In federal courts, citizenship or alienage must be alleged, if jurisdiction depends on citizenship, etc. "No adequate remedy at law" is a useful allegation in an equitable action where the jurisdiction of equity depends on the lack of such remedy at law; but facts substantiating it must be alleged as well.

But location of property is not essential to be alleged for the purpose of fixing the place of trial. *Acker v. Leland*, 96 N. Y., 393, holding that it may be shown by affidavit.

4. *Capacity of party;* as in case of corporation; infant suing by guardian *ad litem*; foreign receiver; executor, etc.

5. *Leave to sue;* (rules uncertain); better opinion that where the requirement is not a condition precedent to right, but only a safeguard against liability for costs, allegation is not necessary. *Hirshfeld v. Kalischer*, 81 Hun, 606.

6. *Allegations relating to the adequacy or ranging of the parties;* as, where you make your co-trustee a defendant, you must allege your reason for so doing, as,—that he is unwilling to sue. Also if you sue in equity in behalf of numerous persons, allege their number and that fact as an excuse for not joining

them. Or, if you sue on a joint obligation, and do not join your joint obligee, allege both the fact and the excuse, as,—that he is dead.

7. *Changes of parties*, which have been made since the cause was commenced and before the complaint is verified.

II.—SHOWING FACTS CONSTITUTING CAUSE OF ACTION.

1. *Plaintiff's right or title.*

2. *The grievance.*

3. *Whether partial satisfaction, if any, should be admitted.*

Query?

4. *Any facts required by statute, or rule of court; e. g., denial of collusion, in some cases; ground of arrest, in some cases.*

5. *An offer to do something*, may in some cases constitute part of the cause of action.

6. *Facts affecting right to costs*, in equitable actions.

III.—ANTICIPATION AND AVOIDANCE OF DEFENCE.

In actions on a common law cause of action use this with great caution, as it is an open question whether it is proper in such cases under the Code. Note in 25 Abb. N. C., 120. [This corresponds to the "charging part" of the bill in equity.]

IV.—DEMAND OF JUDGMENT.

Judgment on failure to answer cannot be more favorable than the demand.

If an interlocutory judgment is required, it better be separately demanded.

If injunction or receiver is desired as part of the final relief it should be demanded in the complaint. A merely provisional remedy like arrest or attachment need not.

V.—OTHER DETAILS.

1. Signature by party in person, or, if infant, by guardian *ad litem*; or by the attorney of the party, or of infant's guardian *ad litem* appearing by attorney.

2. Verification. A complaint must be verified: (a). When service by publication is desired, C.C.P., § 439; (b). When the action is against a joint debtor, not served in a previous action for the same cause brought against all those jointly liable, § 1938; (c).

When it is desired to use the complaint as an *affidavit* (§ 3343, sub. 11) in applying for an order of arrest (§§ 549, 557); or an injunction (§ 607) or an attachment (§ 636) or for any other order.

3. Folioing. (Rule 19.)

4. Endorsing object of action on summons in some cases when served without complaint, §§ 1774, 1897, 1964.

5. Date is not essential and rarely conclusive of anything. But dates of verification or service are important and may determine a legal right.

PRINCIPAL OBJECTIONS TO COMPLAINT; AND DEFENDANT'S REMEDIES THEREFOR.

[NOTE.—We will class as Technical those that can be waived without affecting the merits or result of the action; as Formal, those which, although relating to the form of the proceeding and not affecting the substance, may, if waived, affect the merits or the result. Technical and Formal Objections are not favored by the courts, and should not be raised without due caution and discretion. A note to the attorney of the adverse party is usually better than a motion.]

I.—TECHNICAL OBJECTIONS.

1. Omission to sign—return promptly, with notice. Rule No. 19.

2. Omission to folio—same remedy. *Id.*

3. Tardy service—if proceedings for want of timely service have been or are to be taken, it may be useful to return with notice.

4. Letter-press copy—return promptly, with notice. Rule No. 19.

5. Illegibility—same remedy. *Id.*

II.—FORMAL OBJECTIONS.

1. Omission of court and place of trial—if not supplied by summons, may move to set aside the complaint; but if summons is correct, defect is amendable. *Davison v. Powell*, 13 How. Pr., 287.

2. Misnomer of plaintiff or defendant—plead it in answer.

Traver v. Eighth Ave. R. R. Co., 4 Abb. Ct. of App. Dec., 422.

3. Wrong place of trial—have it changed by demand or motion. Code Civ. Pro., §§ 985, 986.

4. Omission of title—return, with notice; or may move to set aside the complaint. *Swift v. Smith*, 4 Mo. Law Bull., 87. [If the names of the parties do not appear as well in the body of the pleading, the defect is substantial.]

5. Departure from summons—move to set aside the complaint and any proceedings that have been founded upon it. *Allen v. Allen*, 14 How. Pr., 248.

6. Indefiniteness and uncertainty—often a substantial objection. (See below, III, 20.) (At common law, a special demurrer is taken; but under Code Civ. Pro., demurrer will not lie. *Milliken v. West. Un. Tel. Co.*, 110 N. Y., 403.) Remedy: move to compel to make more definite and certain, before answering. N. Y. Code Civ. Pro., § 546; Court Rule 22; *Armstrong v. Danahy*, 75 Hun, 405.

7. Too great generality to enable to plead or to prepare for trial (generally a substantial objection, see below III, 17.)—move for bill of particulars; or, if necessary, move in the alternative, to make more definite, etc., or for particulars; or both. Note as to the distinction between these two species of relief, p. 239 of this volume. Code Civ. Pro., § 531.

8. Commingled statement of several causes of action—cannot demur if the causes are such as could be joined in the same complaint, for then it is not a misjoinder. *Bass v. Comstock*, 38 N. Y., 21. Move to compel separate statement and numbering. *Wood v. Anthony*, 9 How. Pr., 78; or, perhaps, to strike out all the allegations not appropriate to a single cause of action. *Waller v. Raskan*, 12 How. Pr., 28; Code Civ. Pro., § 483.

9. Irrelevant, redundant or scandalous matter—move to strike out. Code Civ. Pro., § 545. Motion must be made before answering or demurring. Rule 22; *Williams v. Folsom*, 57 Hun, 128.

10. Argumentativeness—motion to make more definite and certain. *Marie v. Garrison*, 83 N. Y. 14; s. c., p. 383 of this vol. and see below.

III.—SUBSTANTIAL OBJECTIONS.

1. Ostensible attorney not member of the bar—appear specially and move to set aside all proceedings. Code Civ. Pro., § 64.

2. Action not authorized by plaintiff—same remedy, or, plead want of authority, as a defence.

3. No leave to sue, when leave is required by rule of court or by statute—move to stay, or to set aside all proceedings. Abb. Brief on Pl., p. 249.

May demur for insufficiency, if a statute makes leave to sue part of the cause of action. *Id.*; Palmer v. Davis, 28 N. Y., 242.

4. Complaint not served with summons—demand copy, and if demand not complied with, move to dismiss. Code Civ. Pro., §§ 479, 480.

5. Nonconformity of copy served with original—move to strike original from records or to set aside service. Boston Natl. Bank v. Armour, 50 Hun, 176.

6. Vexatiousness of suit—move to stay proceedings.

7. Service on the wrong person—if in doubt as to whether he may not be bound to appear, appear specially and move to set aside the service and the proceedings founded thereon.*

8. Lack of jurisdiction of the subject matter—motion to vacate summons and dismiss the complaint; demurrer or answer; or objection at the trial. Robinson v. Oceanic Steam Nav. Co., 112 N. Y., 315; s. c., p. 356 of this vol.; Code Civ. Pro., §§ 488, 490. This lack of jurisdiction may depend on residence. Gilbert v. York, 111 N. Y., 544; s. c., p. 347 of this vol.; Wheelock v. Lee, 74 N. Y., 495; s. c., p. 352 of this vol.; Robinson v. Oceanic Steam Nav. Co., *supra*.

9. Lack of jurisdiction of the person, for defect in service—appear specially and move to set aside all the proceedings. Nones v. Hope Mut. Life Ins. Co., 5 How. Pr., 96; s. c., p. 401 of this vol.

10. Lack of jurisdiction of the person because absolutely exempt; *e. g.*, the state, or a foreign ambassador or consul, sued in a state court—appear specially, and move to set aside all proceedings; or demur or answer; or take objection at the trial.*

* It may be that judgment on default would be void for want of jurisdiction.

Compare Code Civ. Pro., § 488, sub. 1.; *Davis v. Packard*, 7 Pet., 278.

11. Lack of capacity to sue—demur or answer; objection cannot be first taken at the trial. N. Y. Code Civ. Pro., § 488, sub. 3., § 499. *Nanz v. Oakley*, 122 N. Y., 631.

12. Lack of guardian *ad litem*—stay till appointment, or, move to set aside proceedings for irregularity. *Freyberg v. Pelerin*, 24 How. Pr., 202.

13. Misjoinder of plaintiffs—demur or answer; objection cannot be first taken at the trial. § 488, sub. 4., § 499.

14. Misjoinder of causes of action (as distinguished from commingled statement of joinable causes)—demur. (Motion before or at the trial to compel election is inappropriate where misjoinder is clear, because the Code provides that this objection may be deemed waived, if not taken by demurrer or answer, § 488, sub. 7.) But causes which can be joined may be inconsistent, in which case you may move before trial; and the court have power to compel election even at the trial. See note in 24 Abb. N. C., 326.

15. Defect of parties—demur or answer. § 488, sub. 6. If the absentee is an “indispensable” party, objection can also be made at the trial. *Bear v. American Rapid Tel. Co.*, 36 Hun, 400.

As to motion to bring in adverse claimant see p. 179 and p. 185 of this vol., and Code Civ. Pro., § 820.

16. Former action pending—demur if it appear on the face of the complaint, or answer if it do not. § 488, sub. 4; 26 Abb. N. C., 218.

17. Insufficiency of facts to constitute a cause of action—demur or answer; or object at the trial before evidence taken. § 488, sub. 8.

18. Alternative allegations—if the result is prejudicial uncertainty, move to make more definite and certain; but an alternative allegation is never stronger than its weakest branch. Abb. Br. on Pl., p. 40, § 46.

19. Inconvenient generality—ask and if necessary move for Bill of Particulars. (See above II., 6.)

20. Lack of copy of account mentioned in complaint—demand copy. § 531. If not served in compliance with demand, move that he be precluded from giving evidence of the account. *Gebhard v. Parker*, 120 N. Y., 33; s. c., p. 579 of this vol.

21. Lack of document alleged as part of plaintiff's case—Bill of Particulars, § 531; or petition for Discovery and Inspection, § 803; *Holmes v. Cornell*, 7 Weekly Dig., 375.

22. Indefiniteness and Uncertainty; if not amounting to substantial insufficiency to constitute a cause of action (in which case demurrer lies)—move to make more definite and certain. (See above II., 5.)

23. Legal conclusion, without facts to bear it out—demur, or move to make more definite and certain, or object at the trial. Abb. Br. on Pl., §§ 40, 535, 563. Taking issue specially on the allegation usually precludes objection at the trial. *Id.*; *Weinhauer v. Morrison*, 49 Hun, 498.

24. Inconsistent allegations in the same cause of action—motion to make more definite and certain. If fatal to the truth of a material allegation demurrer lies.

25. Inconsistent allegations in separate causes of action—motion to make more definite and certain; or to compel election; or, if they cannot be joined, demur for misjoinder.

26. Cause of action, statute barred—if by statute of limitations, by answer. §413.

Staleness of demand in an action of an equitable nature—that the objection should also be taken by answer and not by demurrer, see *Zebley v. Farmers' Loan & Trust Co.*, 139 N. Y., 461.

27. Lack of verification, when same is required by law; as in an action against a joint debtor not originally served, § 1938—remedy, return immediately, with notice, or move to set aside. (A defective verification may be treated as no verification. § 528.)

28. Letter press copy; return immediately, with notice. Rule No. 19.

29. Omission to folio—return immediately, with notice. *Id.*

30. Omission to endorse—return immediately, with notice. *Id.*

31. Demand for wrong relief—demur for insufficiency, if the facts alleged entitle the plaintiff to no part of the relief demanded. Code Civ. Pro., §1207; *Edson v. Girvan*, 29 Hun, 422. But if the relief demanded be merely more or less than the plaintiff is entitled to, a demurrer does not lie, and the defect should be disregarded. *Buess v. Koch*, 10 Hun, 299.

Issue cannot be taken by answer to the demand for relief.

32. Adequate remedy at law—answer; see *Town of Mentz v. Cook*, 108 N. Y., 504; *Ostrander v. Weber*, 114 *id.*, 95; *Watts v. Adler*, 130 *id.*, 646. Compare, *Dalton v. Vanderveer*, 31 Abb. N. C., 430.

33. Amended complaint served for the purpose of delay—move to strike out. C. C. P., § 542.

34. Amended complaint served after time allowed therefor—refuse to accept, or return, with notice. *Hollister v. Livingston*, 9 How. Pr., 140. Such objection waived by answering, *Duval v. Busch*, 21 Abb. N. C., 214.

CONTENTS OF DEMURRER.

I. Showing identity of cause; title of court and cause.

II. Showing who demurs. Joint demurrer is not appropriate for objection by part of the defendants, where the liability is not joint, but several, and where the objection is only good for one.

III. Pointing to the matter demurred to.

(Note: Demurrer to a complaint as a whole is bad, if any one cause of action is good. Demurrer to a single cause of action is not appropriate to raise the objection of misjoinder.)

IV. Specifying the grounds (Code Civ. Pro., §§ 490 and 496). If you only specify something more particularly than the statute, you may be confined to this narrow objection.

V. Other details:

Signature, folioing, indorsing, &c. (verification is not necessary)

CONTENTS OF ANSWER.

I. Showing identity of cause (same as in demurrer).

II. Showing who answers.

III. Showing what is answered, whether it is the whole of the complaint; or one or several causes of action.

IV. How complaint is answered.

1. By denial; which may be,

1. General; or

2. Specific; and each of these may be,

(a) Positive denial.

(b) Denial of knowledge or information sufficient to form a belief.

(c) Denial on information and belief.

See Note on Denials, p. 420 of this vol.

2. By allegation of new matter, not constituting a counter-claim, *i. e.*, matter of avoidance; (at common law the alleged grievance was admitted by pleading new matter).

3. By counter-claim against plaintiff or his cause of action.

4. By claim against co-defendant; but it must be matter involved in the suit, and the answer must be served on such co-defendant as well, § 521.

5. By partial defence; which must, however, under the Code, be characterized as such, § 508.

V. Verification. An answer must be verified:

(a) When it does not involve the merits, § 513.

(b) When the complaint is verified, § 523.

Except the general answer of an infant by his guardian *ad litem*, § 523, and

Except the answer in divorce for adultery, § 1756, and

Except where the party pleading would be privileged from testifying as a witness concerning an allegation or denial contained in the pleading. § 523

But this privilege does not apply where the complaint charges fraud, § 529.

(c) Where it contains a denial which you wish to prevent being stricken out as sham. *Thompson v. Erie Ry. Co.*, 45 N. Y., 468; *s. c.*, p. 434 of this vol.

(d) Where it is desired to put in issue the existence of a corporation, § 1776.

(e) When it is desired to use the answer as an affidavit, § 3343, sub. 11.

VI. Other minor details: same as in complaint and demurrer.

PRINCIPAL OBJECTIONS TO ANSWER.

I. TECHNICAL; *e. g.*, omission of signatures, of folioing or sufficient verification; tardy service, letter-press copy, etc.—remedy, return promptly with notice.

II. FORMAL.

1. Indefiniteness and uncertainty—remedy, motion to correct. (For other kindred objections, see objections to complaint.)

2. Bad denial—if not a clear admission, move to make more definite and certain; if a clear admission, move for judgment; or take objection at the trial. Negative pregnant is now regarded as ground for motion to make more definite and certain; not for disregarding intended issue when objection is not raised till the trial.

3. Commingled statement of separate defences—remedy, motion to compel separate statement and numbering. § 507.

III. SUBSTANTIAL.

1. Bad denial—if a clear admission of the cause of action, motion for judgment on the pleadings, or take objection at the trial. If an admission of part only of the claim, motion to compel the payment or delivery of the admitted part. (Code Civ. Pro., §§ 515, 717.)

2. Insufficiency of new matter as a defence—remedy, demurrer (§ 494) or objection at the trial. But if so extremely insufficient as to be frivolous, motion for judgment. § 537.

3. Partial defence, not pleaded as partial—remedy, demurrer. § 508. (But the better opinion is that matter merely mitigating the amount of damages by negating any of plaintiff's allegations or evidence may be proved under a denial without being expressly pleaded as a partial defence.)

4. Inconsistency between several defences—not objectionable, unless it prove one to be necessarily false in fact, in which case the remedy is:

1. Motion to strike out one as sham; or
2. Motion for judgment on the pleadings; or
3. Motion to compel election; or
4. Objection at the trial.

McIntire *v.* Wiegand, 24 Abb. N. C., 312.

5. Omission to verify where verification is required—return, with notice. § 528.

6. Counter-claim not within the jurisdiction of the court over its subject—demurrer. § 495.

7. Counter-claim on which defendant has not legal capacity to recover—demurrer. *Id.*

8. Counter-claim, another action pending thereon—demurrer. *Id.*

9. Counter-claim inappropriate, *i. e.*, one that cannot be interposed in this action—demurrer. *Id.*

10. Counter-claim, facts not insufficient for—demurrer. *Id.*
(NOTE.—In all of the above cases of counter-claim, reply, if the objection does not appear on the face of the counter-claim.)

11. Frivolousness of answer—if too clear for argument, move for judgment on the answer as frivolous; if not too clear for argument, demur. § 537.

12. Sham allegation of pretended new matter, or sham unverified denial—move to strike out and for judgment. § 538.

13. Other minor details, same remedies as in complaint and demurrer.

ALLEN v. PATTERSON.

New York Court of Appeals, 1852.

[Reported in 7 N. Y., 476.]

1. Facts, but not evidence, must be pleaded.
2. A complaint stating in substance that on, etc., at, etc., plaintiffs at defendant's request sold and delivered to him goods, for which he then owed, or was then bound to pay, plaintiffs, the sum of, etc; and further averring there was then due them from defendant the said sum, for which sum plaintiffs demanded judgment—states facts enough to constitute a cause of action.
These facts are implied in a statement that “defendant is indebted to plaintiffs in the sum of, etc., for goods, sold,” describing the sale as above, in form as in an old count in assumpsit.
3. The allegation that the price is “due” may be reasonably intended to mean that it is payable.
4. “Due” is sometimes used to express the mere statement of indebtedment, and then is an equivalent to owed or owing; sometimes to express the fact that the debt has become payable.
5. The Code rule that allegations “must be liberally construed with a view to substantial justice between the parties,” applied.

An action for the price of goods sold and delivered.

1

The allegations of the complaint were as follows:

“The plaintiffs complain against the defendant for that the defendant is indebted to the plaintiffs in the sum of three hundred and seventy-one dollars and one cent, for goods sold and delivered by the plaintiffs to the defendant at his request, on the first day of May, 1849, at the city of Buffalo, in said county.

And the plaintiffs say that the items in their account exceed twenty in number. And the plaintiffs say that there is now due them from the defendant the sum of three hundred and seventy-one dollars and one cent, for which sum the plaintiffs demand judgment against the defendant, with interest from the 20th day of October, 1849, besides costs. And the plaintiffs say the foregoing complaint is true.”

2

[*A bill of items was annexed to the complaint.*]

The defendant demurred to the complaint, and assigned for cause of demurrer that it did not state facts sufficient to consti-

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3 tute a cause of action, in this: *First*, There is no allegation in the complaint of a contract by the defendant; *Second*, the plaintiffs have alleged no breach of any contract by the defendant; *Third*, there are no facts stated in the complaint showing that the defendant, at the time of the commencement of said action, was indebted to said plaintiffs; *Fourth*, there are no facts stated in the complaint showing anything was due and payable.

4 *The Supreme Court at Special Term*, MARVIN, J., overruled the demurrer [citing *Tucker v. Rushton*, 2 Code Rep., 59], and holding that the insufficiency of the allegation of indebtedness was not fatal because the subsequent statement sufficiently alleged the facts of a sale and delivery; that plaintiff need prove nothing more, and an allegation of breach was not necessary [approving rule in *Glenny v. Hitchins*, 4 How. Pr., 99]; and if defendant relied on payment or unexpired credit, he must show that in defence.

5 *The General Term* affirmed this without further opinion. HOYT, J., dissenting, thought the allegations that defendants were "indebted" and that the sum was "now due," being mere conclusions, must be wholly disregarded; and that reading the complaint without them, there was no allegation that the sale was on a promise to pay at any particular time, or upon request or upon delivery; nor that they were sold upon credit, nor that they were not paid for on delivery; nor was there any allegation of default; and defendant's admission that he had bought goods of plaintiff would not sustain an inference that they were never paid for [citing *Morse v. Bogart*, 4 Den., 108]: "The complaint should show that the goods were sold to be paid for upon delivery, request, at a particular time, or upon some contingency,"

6 and that the defendant had failed to perform on his part."

The Court of Appeals affirmed the judgment.

JEWETT, J. The Code requires that a complaint shall contain a plain and concise statement of the facts constituting the cause of action. (§ 142) [Re-enacted in Code Civ. Pro., § 481.] Every fact which the plaintiff must prove, to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred or stated. This rule of pleading, in an action for a legal remedy, is the same as formerly

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in this, that *facts* and not the *evidence* of facts must be pleaded. 7
(1 Chitty Pl., 215; Read v. Brookman, 3 Term R., 159, per
Buller, J.; Eno v. Woodworth, 4 N. Y., 249.)

The plaintiffs, in their complaint in this action, state that the
defendant is indebted to the plaintiffs in the sum of \$371.01, for
goods sold and delivered by the plaintiffs to the defendant, at his
request, on the 1st day of May, 1849, at the city of Buffalo, in
said county of Erie, and that the items of their account exceed
twenty in number, and that there is now due them from the de-
fendant the sum of \$371.01, for which they demand judgment 8
against the defendant, with interest from the 20th day of
October, 1849, besides costs. In substance, stating that on the
1st day of May, 1849, at the city of Buffalo, in the county of
Erie, the plaintiffs, at the request of the defendant, sold and
delivered to him goods, for which he then owed, or was then
bound to pay, the plaintiffs the sum of \$371.01, and that the
items of their account of such goods exceeded twenty in number;
and further averring that there was then due them from the de-
fendant the sum of \$371.01 (that is, that the time when the said
money for said goods was promised to be paid, had expired) for 9
which sum the plaintiffs demand judgment, etc. The question
is, then, are there facts enough stated to constitute a cause of
action? I think that there are.

The words "that the defendant is indebted to the plaintiffs in
the sum of \$371.01, for goods sold and delivered by them to him,
at his request, on the 1st day of May, 1849," and that there was
then due to the plaintiffs, from the defendant, said sum, clearly
imply that a contract had been made between the plaintiffs and
defendant, by which the former sold and delivered to the latter
goods, at his request, for which he promised to pay the plaintiffs 10
the sum of \$371.01; and that the period when the same was
promised to be paid had expired. It contains every statement of
facts necessary to constitute a good *indebitatus* count, in debt,
according to the mode of pleading before the Code. (2 Chitty
Pl., ed. 1812, 142; Emery v. Fell, 2 Term R., 28; 1 Chitty Pl., 345.)

The counsel for the defendant insisted, that the statement that
there is "due," etc., did not amount to a statement that the debt
had become payable; that it meant no more than the statement

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11 that the defendant is "indebted," etc., and that if the word "due" had two significations, the pleader could not select between them, and impute to it the one which suits his purpose best; for the maxim was, that everything should be taken most strongly against the pleader, or, if the meaning of the words be equivocal, and two meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading.

In the case of the United States v. The State Bank of North Carolina (6 Pet., 29), Judge Story said, that the term "due" was sometimes used to express the mere state of indebtedment, 12 and then it was an equivalent to owed or owing, and it was sometimes used to express the fact that the debt had become payable. In the latter sense, I think, that the word "due" was used by the pleader in the complaint in this suit, and in that sense it may be deemed to have been used. In 1 Chitty Pl., 241, it is said that it is a maxim in pleading, that everything shall be taken most strongly against the party pleading, or rather that if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them; for it is to be 13 intended, that every person states his case as favorably to himself as possible; but that the maxim itself must be received with some qualification, for the language of the pleading is to have a reasonable intendment and construction; and when a matter is capable of different meanings, that shall be taken which will support the declaration, etc., and not the other which will defeat it. (Wyat v. Aland, 1 Salk., 325.)

The Code (§ 159) declares, that in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between 14 the parties; and § 140 provides, that the rules by which the sufficiency of the pleadings is to be determined are modified as prescribed by that act. I think, then, that we are not only authorized, but required, to consider that the term "due" was used in the complaint to express the fact that the money sought to be recovered had become payable, or the time when it was promised to be paid had elapsed. The judgment should be affirmed with costs.

Judgment affirmed.

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SECOR v. STURGIS.

New York Court of Appeals, 1858.

[Reported in 16 N. Y., 548; aff'g 2 Abb. Pr., 69.]

1. *It seems* that an entire claim, arising either upon contract or tort, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment on the merits in either will be available as a bar in the other suits.
2. But several suits may be maintained upon several causes of action; it makes no difference that such causes of action might be united in a single suit.
3. The true distinction between a single and entire demand or right of action, and those which are several and distinct, is, that the items of the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts.
4. Where items of an account arise at different times, there must be either an express contract or the circumstances must be such as to raise an implied contract, embracing all the items, to make them a single or entire demand or cause of action, within the rule against splitting a cause of action.
5. In the case of a running account it may usually be fairly implied that it was kept in pursuance of an agreement that an account might be opened and continued.

Plaintiffs sued as co-partners on a bond given to procure the discharge of defendant's vessel from an attachment alleging a sum due for materials furnished. 1

The plaintiffs were engaged in two different kinds of business, one as ship-chandlers, furnishing stores to ships; the other as ship-carpenters, repairing ships. They did the one business on one floor of their store, the other on another floor, and kept separate accounts of each business, and in this case rendered to the captain who ordered the stores and the repairs, one bill for the stores and another for the repairs; the bill for the stores being \$521.15, that for the repairs \$139.32. 2

The stores were ordered from one clerk of the plaintiffs, and the repairs from another. The plaintiffs first attached the vessel under our State law for the stores, and afterwards libelled her in the United States Court for the repairs. Two of the defendants gave bonds so as to discharge the vessel from the libel, and admitted the liability for the repairs in the action in the United

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- 3 States Court, and allowed judgment for the price of them; and, after that, being sued in this action on the bond given by them to discharge the vessel from the domestic attachment for the stores, they pleaded the recovery in the United States Court as a bar to this action; insisting that the two bills constituted but one cause of action, and that the plaintiffs had split up that cause, and by doing so had lost all that they did not recover in the United States Court. The attachment for the stores was on the 20th December, 1849, the libel for repairs on the 29th of that month. The defendants on the 28th of that month, got
4 the domestic attachment discharged, and on the same day executed their bond, conditioned to pay the amount of all such claims and demands as had been exhibited, and which should be established to have been subsisting liens on the vessel.

At Circuit plaintiffs had a verdict.

The General Term of the Supreme Court affirmed the judgment, on grounds similar to those presented in the opinion of the Court of Appeals, which see below.

5

The Court of Appeals affirmed the judgment.

- STRONG, J. It is not controverted that the account, the amount of which is sought to be recovered in this action, was due to the plaintiffs, and a lien on the vessel, at the time of the application for the attachment, and also at the time of the execution of the bond on which this action is founded; but it is insisted that the said account, and the account for which judgment was recovered in the District Court of the United States, together, constituted a single cause of action, and that the judgment for
6 part of it is a bar to a recovery in this action for the residue. The answer does not, in express terms, allege that the cause of action in the suit in the District Court was the same as that in the present suit, but it was treated in the reply as containing substantially that allegation, and must therefore be so regarded by the court. It was essential, in order to present the question raised, that the identity of the cause of action in the different suits should, in some form, be averred in the answer (3 Chit. Pl., 928, 9; *Philips v. Berick*, 16 Johns., 136, 137, 140).

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The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits. (Farrington v. Payne, 15 Johns., 431, 432; Smith v. Jones, *id.*, 229; Philips v. Berick, 16 *id.*, 136, 137; Miller v. Covert, 1 Wend., 487; Guernsey v. Carver, 8 *id.*, 557; Stevens v. Lockwood, 13 *id.*, 644; Colvin v. Corwin, 15 *id.*, 557; Bendernagle v. Cocks, 19 *id.*, 207, and cases there cited). But it is entire claims only which cannot be divided within this rule, those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon several causes of action. The holder of several promissory notes may maintain an action on each; a party upon whose person or property successive distinct trespasses have been committed may bring a separate suit for every trespass; and all demands, of whatever nature, arising out of separate and distinct transactions, may be sued upon separately. It makes no difference that the causes of action might be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance, except that in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the actions.

It is not, as will be seen by the cases, always easy to determine whether separate items of claim constitute a single or separate cause of action, and this difficulty, connected with neglect, in some instances, of proper attention to the principle of the rule under consideration, has led to some loose expressions and confusion in the books on this subject. Farrington v. Payne, was

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- 11 a plain case of an indivisible cause of action. A bed and bed quilts were taken at the same time and by the same act, and a recovery in trover for the quilts was held to be a bar to a recovery in trover for the bed. In *Smith v. Jones*, actions were brought for goods sold and delivered, the plaintiff, in one, claiming to recover for one barrel of potatoes, and in the other for two barrels of the same article, all sold at the same time. The court held that the demand could not be divided into separate suits. This was also a plain case of one cause of action. *Miller v. Covert*, in which the same rule was applied, was a case of a
- 12 sale of hay, under a contract, delivered in parcels. The demand was held to be entire and indivisible.

- In *Guernsey v. Carver*, the plaintiff declared on a book account consisting of items of merchandise delivered between the 20th of July and the 27th of August, 1828, amounting to \$2.35. The defendant pleaded a former suit for the same identical cause and causes of action. It was proved in the Common Pleas that the plaintiff had an account against the defendant, consisting of twenty different articles of merchandise,
- 13 delivered on fourteen different days between the 4th of June and the 27th of August, 1828, amounting to between \$5 and \$6; that he commenced a suit against the defendant, and exhibited an account of items delivered between the 1st of June and the 19th of July, 1828, amounting to \$2.74, that the defendant pleaded a tender in such suit, and obtained judgment for costs. The plaintiff then sued for the balance of such account, viz.: for items delivered between the 20th of July and the 27th of August. The Common Pleas decided that on a running account, where no special contract was made at the commencement of
- 14 the account, and where items have been delivered on such account at different times, without any intermediate agreement, each separate delivery formed a separate and distinct cause of action, and that separate suits might be maintained on each separate delivery; and the plaintiff recovered judgment. On appeal to the Supreme Court the judgment was reversed. The court, by NELSON, J., after stating that it was settled in that court that if a plaintiff bring an action for part only of an entire and indivisible demand, the judgment in that action is a con-

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clusive bar to a subsequent suit for another part of the same 15
demand, says: "This case comes within the reason and spirit
of that principle. The whole account being due when the first
suit was brought, it should be viewed in the light of an entire
demand, incapable of division, for the purpose of prosecu-
tion. The law abhors a multiplicity of suits. According to the
doctrine of the court below, a suit might be sustained, after
the whole became due, on each separate item delivered, and if
any division of the account is allowable it must, no doubt, be
carried to that extent. Such a doctrine would encourage intol-
erable oppression upon debtors, and be a just reproach upon the 16
law. The only just and safe rule is to compel the plaintiff,
on an account like the present, to include the whole of it due in
a single suit. The reasoning of the learned justice would make
every account consisting of different items, the whole of which
is due, an entire demand incapable of division for the purpose
of prosecution irrespective of every other consideration. It
excludes the idea that it is necessary the claims should have
arisen out of a single transaction, or be connected together by
contract. This, in my opinion, is carrying the doctrine in ques- 17
tion far beyond its just limits. *Stevens v. Lockwood* was a case
similar to the last, and decided upon similar views. These cases
may have been rightly decided, but I cannot assent to all the
reasons given for the decisions.

In *Colvin v. Corwin*, two suits were brought for lottery tickets
sold the defendant. On the trial of the first the defendant
admitted he had bought the tickets alleged to have been sold to
him, and judgment was rendered for the plaintiff. The judg-
ment was set up as a bar in the second suit, and on the trial it
appeared that the tickets claimed in the suits were delivered to 18
the defendant by two different agents of the plaintiff, at different
offices occupied by them, at different times, and it was held by
the Supreme Court that the previous judgment was a bar to
recovery. It is manifest that this decision rests on no sound
principle, and is not law. A plainer case of distinct independent
causes of action could hardly be presented.

Bendernagle v. Cocks was an action for breaches of certain
covenants contained in an indenture of lease. A plea in abate-

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19 ment was interposed of an action pending upon the same lease for the alleged breach by the defendant of covenants therein. It is stated in the reporter's note that all the causes of action had accrued at the time of the bringing of the first action. The plaintiff replied that the covenants, for the breach of which the first suit was brought, were other, distinct and different from the covenants for the breach of which the second suit was brought. The defendant demurred, and the Common Pleas overruled the demurrer, but the Supreme Court reversed the judgment. COWEN, J., who delivered the opinion of the court, 20 reviews and comments upon many of the cases, after which he makes the following observations: "I admit that the rule does not extend to several and distinct trespasses or other wrongs, nor as we have seen, to distinct contracts. It goes against several actions for the same wrong, and against several actions on the same contract. All damages accruing from a single wrong, though at different times, make but one cause of action, and all debts or demands already due by the same contract make one entire cause of action. Each comes under the familiar rule that 21 if a party will sue and recover for a portion, he shall be barred of the residue. Proof of that fact would sustain the common issue presented in *Bagot v. Williams*, that the plaintiff had before impleaded the defendant, and recovered for the same identical cause of action," etc.

The true distinction between demands or rights of action which are single and entire, and those which are several and distinct is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps as simple and safe a test as the subject admits 22 of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one and only one cause of action. The case of a contract containing several stipulations to be performed at different times is no exception; although an action may be maintained upon each stipula-

tion as it is broken, before the time for the performance of the 23
 others, the ground of action is the stipulation which is in the
 nature of a several contract. Where there is an account for
 goods sold, or labor performed, where money has been lent to
 or paid for the use of a party at different times, or several items
 of claim spring in any way from contract, whether one only or
 separate rights of action exist, will, in each case, depend upon
 whether the case is covered by one or by separate contracts.
 The several items may have their origin in one contract, as on
 an agreement to sell and deliver goods, or perform work, or
 advance money; and usually, in the case of a running account, 24
 it may be fairly implied that it is in pursuance of an agreement
 that an account may be opened and continued, either for a defi-
 nite period or at the pleasure of one or both of the parties. But
 there must be either an express contract, or the circumstances
 must be such as to raise an implied contract, embracing all the
 items, to make them, where they arise at different times, a single
 or entire demand or cause of action.

Applying this test to the present case, it is very clear that the
 two accounts did not constitute an entire claim, but, on the con- 25
 trary, that they were several and formed two several causes of
 action. The business of the plaintiffs consisted of two branches,
 which were designed to be and were kept entirely distinct, in
 each of which one of the accounts was made, and an arrangement
 was entered into under which one of the accounts arose anterior
 to the opening of the other account. Here was no express con-
 tract connecting the two accounts; and the facts, instead of war-
 ranting the presumption of such a contract, show that separate
 agreements only, one in regard to each account, were intended.

[*A ruling on another point is omitted.*]

All the judges concurred.

Judgment affirmed.

Sharp v. Hutchinson, 100 N. Y., 533.

SHARP v. HUTCHINSON.

New York Court of Appeals, 1885.

[Reported in 100 N. Y., 533; aff'g 49 Super. Ct., 50.]

1. In an action against one who has become liable as a general partner by reason of a failure to comply with the statute of limited partnerships, it is sufficient for the complaint to allege the defendants to have been partners without mentioning their attempt to form a limited partnership.
2. The cause of action against him is not based upon the statute, but upon his common law liability as a general partner.

1 Action for the price of goods sold.

 The complaint was as follows:

Superior Court of the City of New York.

James L. Sharp, Plaintiff,

against

Andrew H. Hogg, Alexander
2 H. Patterson and David J.
 Hutchinson.

Plaintiff, by Robertsons, Harmon and Cuppia, his attorneys herein, complains of the defendants above named and alleges:

I. That at the times hereinafter mentioned, the defendants were copartners in trade, carrying on business in the city of New York, under the firm name and style of Hogg & Patterson.

- 3 II. That as such copartners, the defendants, at the city of New York, between the 7th day of December, 1880, and the 9th day of March, 1881, purchased and received of plaintiff certain goods, wares and merchandise, consisting of gas stoves and gas heating burners, at the agreed price, and of the just and reasonable value of \$97.25, which said sum defendants promised and agreed to pay to plaintiff therefor.

III. That no part of said sum has been paid except the sum of \$25.00, which defendants paid generally, on account thereof, on the 6th day of May, 1881.

Sharp v. Hutchinson, 100 N. Y., 533.

Wherefore, plaintiff demands judgment against the defendants 4
for the sum of seventy-two dollars and twenty-five cents, with
interest thereon from the 9th day of March, 1881, besides costs.

Robertsons, Harmon & Cuppia,
Pltffs. Att'ys.

The answer (omitting title) was as follows :

The defendant, David J. Hutchinson, separately answers the
complaint in this action by George H. Forster, his attorney
herein, upon information and belief, as follows :

First. He denies each and every allegation contained in said 5
complaint, except such as are hereinafter expressly admitted to
be true.

Second. He alleges that heretofore a limited partnership was
formed pursuant to the laws of the State of New York, under
the firm name of Hogg & Patterson, in which the general
partners were Andrew H. Hogg and Alexander H. Patterson,
and that said partnership was to commence on the 29th day of
April, 1880, and to terminate on the 29th day of April, 1883,
and that this defendant was a special partner therein, and was 6
not otherwise interested in or related to said partnership or its
business, and that said limited partnership continued at the
several times mentioned in the complaint.

WHEREFORE, he demands judgment, that the complaint as to
him be dismissed, with costs.

GEO. H. FORSTER,
Att'y for Def't Hutchinson.

At the trial the plaintiff proved the sale of the goods to the
firm. He also gave in evidence the papers by which, in the 7
organization of the firm, it had been attempted to create a special
or limited partnership under the statute; (1 R. S., 765 [8th ed.,
2493, vol. 4], sec. 8); and offered testimony to show that no
actual cash payment of capital had been made by the proposed
special partner, as required by the statute in order to constitute
a limited partnership.

The evidence was excluded on the ground that the pleadings
laid no foundation for it.

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- 8 *The Superior Court at General Term* held that, as the answer set up a limited partnership, it was error so to hold; and reversed the judgment dismissing the complaint.

SEDGWICK, Ch. J., delivering the opinion of the court, said, in part:

"If in this action the defendant had not in the answer set up the existence of the limited partnership, it might have, perhaps, been necessary to determine whether an allegation of general partnership is supported by proof that the certificate or affidavit filed under the statute to form a limited partnership was false.

- 9 "One question would be, does negating the assertions of the certificate or affidavit tend to show that such facts as are essential to copartnership had an existence? Or does it tend only to show the liability as a partner under the statute?

- "Another question would be, if it tend to show only the latter must not the special facts, which under the statute create the liability, be pleaded? But when the defendant, to a complaint of general partnership, avers the making of the limited partnership, the ground of the exclusion of the questions on the trial in
10 this case cannot, in my judgment, be sustained. The ground was that to show the falsity of the certificate or affidavit was not relevant to any issue in the case, as the complaint did not state a cause of action based upon the falsity. There was, however, an issue arising from the answer to which the questions were relevant, and which required their admission, unless they had been excluded on an objection which was not taken, and which perhaps would not be held to be sound, that is, that the testimony should not be called for until the defendant had given his case.

- 11 "Section 522 of the Code of Civil Procedure declares that allegation of new matter in an answer is to be deemed controverted by the adverse party." * * *

FREEDMAN, J., concurred.

The Court of Appeals affirmed the judgment of the General Term.

EARL, J. In April, 1880, the defendants attempted to form a limited copartnership for the purpose of carrying on business in the city of New York, under the firm name of Hogg & Patter-

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son, the defendant Hutchinson being the special partner. There- 12
after the plaintiff sold the firm certain goods, and this action was
brought against all the members of the firm to recover the price
of such goods. The defendant Hutchinson alone defended, set-
ting up as his answer the formation of the limited copartnership,
and claiming exemption from liability under the statute as a
special partner.

The plaintiff in his complaint alleged a cause of action against
the defendants as copartners, making no mention of the attempt
to form a limited copartnership; and upon the trial he proved 13
the sale of the goods to the firm, and then introduced in evi-
dence the certificate and papers filed for the formation of the
limited copartnership, from which it appeared that Hutchinson
contributed to the capital of the firm \$10,000; and then he
offered to prove that he in fact contributed only \$8,000. Upon
the objection of Hutchinson's counsel this proof was rejected on
the sole ground that it was not within the issue. The view of
the trial judge was that the complaint, instead of treating Hutch-
inson as a mere general partner, should have been based upon
the statute alleging the special defects in the formation of the 14
limited copartnership.

In this there was error. If the proof had been received it
would have shown that Hutchinson never in fact became a special
partner, but that he was from the beginning a general partner,
and liable as such. (2 R. S., chap. 4. tit. 1, § 8.) The cause of
action against him was not based upon the statute, but upon his
common law liability as a general partner, and hence it was
proper, in setting forth in the complaint the facts constituting
plaintiff's cause of action, to charge him as a general partner, and
then upon the trial to show that he was such by any competent 15
proof.

The General Term was, therefore, right in reversing the
judgment of the Special Term, and its order should be affirmed,
and judgment absolute ordered for the plaintiff with costs.

All the judges concurred.

Order affirmed, and judgment accordingly.

Albany & Rensselaer Co. v. Lundberg, 121 U. S., 451.

ALBANY & RENSSELAER CO. v. LUNDBERG.

United States Supreme Court, 1887.

[Reported in 121 U. S., 451 ; rev'g 32 Fed. Rep., 501.]

1. Under N. Y. Code Civ. Pro., § 449—allowing a trustee of an express trust to sue in his own name—one who made a contract in his own name, but described himself therein as agent of a third person, may sue thereon in his own name ; and this rule is applicable to a suit in a court of the United States within such state.
 2. If the agreement is interpreted as having been made by the signer personally, then the price is payable to him personally ; if as having been made as agent for another, then the price is payable to him as trustee of an express trust.
- 1 Action by seller against buyer for refusing to accept and pay, etc.

The allegations of the complaint were :

I. For a first cause of action.

1. The plaintiff is not a citizen of the United States, but is an alien and subject of the kingdom of Sweden and Norway, and resides in Boston in the State of Massachusetts.
2. The defendant is a corporation duly created and existing under the laws of the State of New York, and is a citizen thereof and of the United States, and has an office for the transaction of business in the southern district aforesaid, to wit, in the city of New York.
3. On the 10th day of February, 1880, the plaintiff, by an instrument in writing, duly signed by him and by the defendant, agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiff, certain goods, wares and merchandise described in said contract, which, at the prices then and there agreed upon by and between the parties, amounted, in the aggregate, to the sum of twenty-three thousand nine hundred and twenty-two 34-100 dollars (\$23,922.34), and which amount the defendant then and there agreed to pay, according to the terms of said contract, all of which will, by reference to the said agreement, a copy of which, marked "A," is hereto annexed and made part of this complaint, more fully and at large appear.

4. Thereafter and on the 9th day of June, 1880, the plaintiff delivered to the defendant, in fulfillment of the contract aforesaid, marked "A," four hundred and ninety-eight tons seven hundred weight two quarters and sixteen pounds of Swedish charcoal gray pig iron, of the brand N B G P H, on the wharf in the city of New York, duty paid. The said iron had been shipped from Sweden in May, 1880, which was as early a time of shipment as the plaintiff was able to ship that amount and quality and brand of iron. The defendant received the same without objection, on the ground that the amount thereof was slightly less than the amount of five hundred tons mentioned in said contract, and caused the same to be transported to Troy, in New York, and examined the same there, and then and there refused to accept or pay for the same, on the ground that the same was not of the quality and description called for by said contract. Upon the said delivery of said goods plaintiff duly rendered his bill for the same and demanded that the defendant should pay for the same thirty days after the delivery aforesaid, which bill the defendant refused to pay. The interest on the amount of said contract paid from July 9, 1880, to August 24, 1881, amounts to the sum of one thousand six hundred and fourteen 79-100 dollars (\$1,614.79).

5. The plaintiff, upon such refusal, duly notified the defendant that he would proceed to sell the said iron on account of the defendant, and would hold the defendant responsible for any loss arising upon the said resale. After the said refusal and notice, and at various times during the year 1881 and down to and including August 24, 1881, the plaintiff, in good faith and with due diligence, sold the said goods for the account of the defendant for the best price that could then and there be obtained—to wit, the sum of sixteen thousand five hundred and eighty-one 71-100 dollars (\$16,581.71), amounting, together with interest on sales from dates thereof to August 24, 1881, to the sum of sixteen thousand six hundred and seven 58-100 [dollars] (\$16,607.58), leaving a balance due to the plaintiff from the defendant of eight thousand nine hundred and thirty 15-100 dollars (\$8,930.15), no part of which has been paid to the plaintiff.

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- 8 6. The plaintiff paid, laid out and expended for the defendant on such resale as and for the necessary and reasonable expenses upon the same, the sum of one thousand eight hundred and seventy-four 9-100 dollars (\$1,874.09), as will more fully appear from the account thereof, annexed hereto and marked "C," by reason whereof the defendant became justly indebted unto the plaintiff in said sum in addition to the balance aforesaid, amounting together to the sum of ten thousand eight hundred and four 24-100 dollars (\$10,804.24), no part of which has been paid to the plaintiff.

- 9 II. [*For a second cause of action the complaint stated another contract which differed only in being for the sale and purchase of "300 tons of brands SBVE and NBBBK."*]

III. For a third cause of action.

The plaintiff, to avoid unnecessary repetition, refers to and restates the allegations of the first and second causes of action hereinbefore alleged, and makes them part of his statement of the third cause of action.

- 10 After the plaintiff had demanded and been refused payment for the iron delivered to the defendant, as in the statement of said first and second causes of action is averred, and after the plaintiff had given notice to the defendant that he would proceed to sell the same for the account of the defendant, the defendant refused to give up the said iron, except on the payment by the plaintiff of six hundred and twenty-two 67-100 dollars (\$622.67), the amount of the freight from New York to Troy, paid by the defendant, and which amount defendant demanded from plaintiff, although by the terms of the contract
- 11 defendant was bound to pay said freight. Plaintiff thereupon, in order to obtain the said iron and make delivery thereof to the several purchasers upon such resale, was compelled to, and did on or about the 6th day of August, 1881, pay to the defendant the amount so demanded, which amount still remains due and owing from said defendant to said plaintiff; but the defendant, although thereto requested, has not paid the same, nor any part thereof.

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IV. [*For a fourth cause of action, the complaint alleged 12 work, labor, and services performed in and about the sale.*]

“A.

“Copy of Contract.

[*N. M. Hoglund's Sons & Co., Stockholm; Gustaf Lundberg, successor to Nils Mitander :*]

[*38 Kilby street, Boston, February 10, 1880.*]

[*Note. The foregoing three lines in brackets and the words below enclosed in brackets, did not appear in the exhibit annexed to the complaint; but did appear in the contract given in 13 evidence.*]

“I, Gustaf Lundberg, agent for N. M. Hoglund's Sons & Co., of Stockholm, agree to sell, and we, Albany and Rensselaer Iron & Steel Co., Troy, N. Y., agree to buy the following Swedish charcoal grey pig iron, viz: 500 tons of brand NBGPH, at a price [*of*] forty-eight (\$48) dollars, American gold, per ton of 2,240 lbs., delivered on wharf [*at*] New York, duty paid: [*said iron to be in accordance with an analysis furnished in Gustaf Lundberg's letter of 6th February.*] Payment in gold in 14 Boston [*or*] New York funds within 30 days from date of ship's entry at custom house. Shipment from Sweden [*during the season*], say May next, or sooner, if possible. The above quantity hereby contracted for to be subject to such reduction as may be necessitated by natural obstacles and unavoidable accidents. The seller not accountable for accidents or delays at sea. Signed in duplicate.

“Accepted: GUSTAF LUNDBERG.

“Accepted: ALBANY & RENSSELAER IRON & STEEL Co.”

Selden E. Marvin, Treasurer.”

15

In the United States Circuit Court for the Southern District of New York, it appeared on the trial that defendant, in consequence of an analysis refused to accept and pay for the iron, and returned it to the plaintiff, who afterwards sold it for less than the contract price, and brought this action to recover the difference.

The jury returned a verdict for the plaintiff on the first, second and third causes of action, but not on the fourth.

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- 16 Judgment was rendered for upwards of \$15,000.

The defendant sued out this writ of error.

The *Supreme Court of the United States* (while reversing the judgment and directing a new trial for error in receiving evidence), sustained the complaint.

GRAY, J. [*after recapitulating the facts*]: The first question presented by the bill of exceptions, is, whether this action can be maintained in the name of Lundberg, or should have been brought in the name of his principals, N. M. Hoglund's Sons & Co.

- 17 The paper upon which each of the contracts in suit is written has at its head, besides the name of that firm, the name of "Gustaf Lundberg, successor to Nils Mitander," followed by the street and number of his office in Boston. The contract itself begins with a promise by him in the first person singular, "I, Gustaf Lundberg, agent for N. M. Hoglund's Sons & Co. of Stockholm, agree to sell;" the description added to his name in this clause is the only mention of or reference to that firm in the contract; his promise is not expressed to be made by them as their agent, or in their behalf; and the agreement is
18 signed by him with his own name merely.

- There are strong authorities for holding that a contract in such form as this is the personal contract of the agent, upon which he may sue, as well as be sued, in his own name, at common law. *Kennedy v. Gouveia*, 3 D. & R., 503; *Parker v. Winlow*, 7 E. & B., 942; *Dutton v. Marsh*, L. R., 6 Q. B., 361; *Buffum v. Chadwick*, 8 Mass., 103; *Packard v. Nye*, 2 Met., 47. In *Gad v. Houghton*, 1 Ex. D., 357, the contract which was held not to bind the agent personally was expressed to be made "on account of the principals;" and in *Oelricks v. Ford*,
19 23 How., 49, in which the contract, which was held to bind the principal, more nearly resembled that before us than in any other case in this court, the important element of a signature of the agent's name, without addition, was wanting.

But it is unnecessary to express a definitive opinion upon the question in whose name, independently of any statute regulating the subject, this action should have been brought.

The Code of Civil Procedure of the state of New York contains the following provision:

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"Sec. 449. Every action must be prosecuted in the name of 20
the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

Under this provision, the Court of Appeals of that state has held that an agent of a corporation, to whom, "as executive agent of the company," a promise is made to pay money, is "a 21
person with whom, or in whose name, a contract is made for the benefit of another," and may therefore sue in his own name on the promise. *Considerant v. Brisbane*, 22 N. Y., 389.* The rule thus established is applicable to actions at law in the courts of the United States held within the state of New York. *Rev. Stat.*, § 914; *Sawin v. Kenny*, 93 U. S., 289; *Weed Sewing Machine Co. v. Wicks*, 3 Dillon, 261; *United States v. Tracy*, 8 Benedict, 1.

The case then stands thus: If the agreement to sell is an 22
agreement made by Lundberg personally, and not in his capacity of agent of the Swedish firm, the price is likewise payable to

* In *Considerant v. Brisbane*, 22 N. Y., 389, it appeared that defendant subscribed for stock in a foreign corporation by signing a paper, whereby he promised to pay a certain specified sum to "Considerant, as executive agent of" the corporation. In an action brought in the name of C., upon the notes,—*Held*, 1. That the contract was between the defendant and the corporation; that C. had no beneficial interest in it, was not bound by it, and was not "the real party in interest." 2. That he was "a trustee of an express trust," within the meaning of Code Pro., § 111 23
[Re-enacted in Code Civil Pro., § 449], and as such could maintain an action upon the notes in his own name. He was a person "in whose name a contract is made for the benefit of another."

In *Nelson v. Eaton*, 7 Abb. Pr., 305, plaintiff sued as trustee under a trust agreement, whereby defendant's promissory note had been placed in plaintiff's hands as collateral. The trust agreement gave the trustee power only to sell the note.—*Held*, on demurrer, that plaintiff did not have legal capacity to sue on the note as trustee of an express trust; that the express authority to sell the note excluded any presumption that he had a right to sue on it.

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24 him personally, and the action on the contract must be brought in his name, even at common law. If, on the other hand, the agreement must be considered as made by Lundberg, not in his individual capacity, but only as agent and in behalf of the Swedish firm, and for their benefit, then the price is payable to him as their agent, and for their benefit, in the same sense in which an express promise to pay money to him as the agent of that firm would be a promise to pay him for their benefit, and therefore, by the law of New York, which governs this case, an
25 action may be brought in his name. In either view, this action is rightly brought.

[*The Court then discussed the merits and held that the judgment must be reversed for error in the rulings upon evidence.*]

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

POPE v. TERRE HAUTE CAR & MFG. CO.

New York Court of Appeals, 1887.

[Reported in 107 N., Y. 61; rev'g 84 Hun, 633.]

1. An executory contract for the sale of goods containing no provision as to the time when delivery is to be made, is in legal effect an engagement on the part of the seller to deliver within a reasonable time.
 2. A complaint for breach, by the buyer, of an executory contract of sale in which no time for performance was specified should allege an offer to deliver the goods within a reasonable time, and is fatally defective, if there is no allegation as to when the contract was to be performed, or of the plaintiff's performance in respect to time.
 3. Such defect is not waived by failure to demur or answer, but may be objected to on the trial.
- 1 Action by the sellers against the buyer in a contract for the sale of goods.

The complaint, omitting formal parts, was:

"*First.* That at the times hereinafter mentioned these plaintiffs were, and now are, copartners in business, and doing business in the City of New York under the style and firm name of Thomas J. Pope & Brother.

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Second. That said defendant is a corporation duly incorporated and organized under and by virtue of the laws of the State of Indiana. 2

Third. That heretofore and on or about the second day of February, 1880, at the City of New York, these plaintiffs sold to said defendant and said defendant purchased of these plaintiffs, three hundred (300) tons No. 1 Calder Iron, at and for the price and sum of twenty-nine dollars (\$29) per ton cash, to be delivered in bond at New Orleans, Louisiana.

Fourth. That said iron was and is Scotch iron, and has to be imported from Scotland, and that said sale was made subject to the ocean risks. 3

That said sale was made through Millard & Combs, brokers, doing business as such in St. Louis. That defendant well knew that said Millard & Combs, were brokers, not merchants, and were selling said iron as brokers.

Fifth. That said defendant, knowing that said iron was for sale, made an offer for it, and these plaintiffs accepted said offer in the City of New York.

Sixth. That after the terms of said sale had been fixed, said brokers made and signed a note or memorandum in writing of said sale usually known as a broker's "bought and sold note" giving and containing all the material facts of said purchase and sale. 4

Seventh. That these plaintiffs duly ordered the shipment of said iron. That the same arrived safely in New Orleans, and was there placed in bond. That thereupon these plaintiffs notified said defendant, and tendered delivery of said iron, and demanded payment therefor according to the terms of said contract.

Eighth. That said defendant positively refused to receive said iron or any part of it, and positively refused to pay for the same, or to perform its said agreement of purchase, or any part of it. 5

Ninth. That thereupon the plaintiffs duly notified said defendant that they should sell said iron for their account and risk, and specified the time and place of such sale.

That not having received any payment, or performance on the part of the defendant, plaintiffs did on or about the 26th day of

Pope v. Terre Haute Car & Mfg. Co., 107 N. Y., 61.

- 6 June, 1880, sell said iron for \$15 per ton, in bond in New Orleans.

Tenth. That the total amount realized upon the re-sale of said iron was \$4,500. That that was the full value, and the best price that could be obtained for said iron at that time. That the expense of moving, storing and protecting said iron, and for the re-sale of the same was \$443 $\frac{80}{100}$, which these plaintiffs were compelled to and did pay.

- 7 *Eleventh.* Plaintiffs further say that after crediting said defendant with the net proceeds of said iron, the said defendant still remains indebted to them in the sum of four thousand six hundred and forty-nine $\frac{80}{100}$ dollars (\$4,649.80).

WHEREFORE, by reason of the premises the plaintiffs demand judgment against said defendant for the said sum of four thousand and six hundred and forty-nine $\frac{80}{100}$ dollars (\$4,649 $\frac{80}{100}$), with interest thereon from the 26th day of June, 1880, and costs of this action."

The "bought and sold" note put in evidence was:

- 8 Sale Memo.

"ST. LOUIS, Feb'y 2d, 1880.

"Sold Terre Haute Car & M'fg Co. for account Pope & Bros., 300 tons No. 1 Calder, at \$29 cash, in bond, New Orleans, subject to ocean risks.

"Accepted: T. H. C. & M'F'G Co.,

"By J. B. HAGER, Pt."

- 9 *In the Supreme Court, at the trial,* the defendant's counsel moved to dismiss the complaint on the grounds (1) that it did not allege when the contract was to be performed, and (2) that it did not allege performance, or offer or tender of performance within the time.

The motion was denied, and judgment was entered upon a verdict for plaintiff.

The General Term affirmed the judgment.

The Court of Appeals reversed the judgment.

ANDREWS, J. [*after reciting the grounds of defendant's motion*]: The plaintiffs did not offer to amend the complaint,

and no amendment was made at any stage of the trial. We think 10
the motion should have been granted. There is no allegation in
the complaint as to the time within which the contract was to be
performed by delivery of the iron, and no time is mentioned in
the written contract. The law supplies the omitted term, and
the contract in legal effect was an engagement on the part of the
plaintiffs to deliver within a reasonable time. (Benjamin on
Sales, § 683, note and cases cited; 2 Pars. on Con., 535, and
cases cited.) The promise of the plaintiffs to sell and deliver
the iron, and of the defendants to receive and pay therefor, were
mutual and concurrent, and neither party can maintain an action 11
against the other for a breach of the contract without proving
performance on his part. It was, therefore, necessary, as matter
of proof, that the plaintiff should show that he delivered, or
offered to deliver, the iron within a reasonable time, for this was
his contract, and whatever is essential to a cause of action must
be averred. The principle is very clearly stated in *Osborne v.*
Lawrence (9 Wend., 135), in which the court says: "The time
when a promise is to be performed is always material and must
be stated according to the truth, and proved as stated, whether it 12
be upon the request of the plaintiff, or upon a particular day, or
in a reasonable time." The complaint alleges that the iron
arrived in New Orleans, and that the plaintiffs notified the
defendant and tendered delivery and demanded payment. But
there is no averment when the iron arrived, or was tendered, or
when by the contract it was to be delivered, or that delivery was
tendered within a reasonable time, nor is any fact stated from
which it can be inferred that the plaintiffs in that respect had
performed their contract. The allegation that the plaintiffs
"duly ordered the shipment," does not answer their obligation. 13
Their contract was to deliver in a reasonable time, and the
undertaking and its performance should have been alleged. The
circumstance that they "duly ordered the shipment," or that the
vessel was delayed by stress of weather, or similar facts, might
have been relevant on the issue of performance. The difficulty
is that the complaint does not show that the defendant was
bound to accept or pay for the iron, because it neither sets out
the plaintiffs' undertaking as to the time of delivery, or its per-

Golden Gate Co. v. Jackson, 18 Abb. N. C., 476.

14 formance, which was, in part, the consideration of the promise of the defendant. The defect in the complaint was not waived because the objection was not taken by demurrer or answer. (Code, § 499.) The plaintiffs did not apply for an amendment, but took the risk of the sufficiency of the complaint, and cannot on this appeal be relieved from their position. (*Tooker v. Arnoux*, 76 N. Y., 397; *Southwick v. First Nat. Bank*, 84 *id.*, 420.)

Other questions have been argued, but as the point already
15 considered is decisive of this appeal, it becomes unnecessary to consider them.

The judgment should be reversed and a new trial ordered.

All the judges concurred.

Judgment reversed.

GOLDEN GATE CO. v. JACKSON.

N. Y. Supreme Ct., Special Term, First Dep., May, 1884.

[Reported in 18 Abb. N. C., 476.]

1. To sustain an attachment in an action on contract, the specific sum due must be established by proof, not merely averred. Hence, if plaintiff by adopting the wrong measure of damages claims too much, the attachment must be vacated.
 2. Where the plaintiff stated his cause of action as for the seller's breach of agreement to take and pay for goods sold to him, and without any indication that the goods were to be manufactured for the purpose of the contract,—*Held*, that as he claimed damages in the amount of the contract price instead of claiming the difference between the contract and the market price, his attachment could not be sustained.
- 1 Motion to vacate attachment.

Plaintiff sued on a contract to sell and deliver machines to the defendant, on the defendant's failure to receive and pay for the articles and obtained an attachment against defendant's property as a provisional remedy under the Code of Civil Procedure.

BARRETT, J. The point is well taken that the damages are not liquidated by the affidavit. An attachment cannot be reduced, consequently a general averment of damage, as in a com-

Note on the Seller's Actions on the Contract of Sale.

plaint, will not do. The specific sum must be established by proof, not merely averred. 2

Here the plaintiff sues for the contract price, claiming that as his damage. But such is not his damage. His damage is the difference between the contract and the market price of the property at the time for delivery (*Billings v. Vanderbeck*, 23 Barb., 546; *Davis v. Shieds*, 24 Wend., 322; *Sedg. on Dam.*, 260). This rule is not affected by the foreign cases cited by plaintiff. The case of *Bement v. Smith* (15 Wend., 493) was explained in *Billings v. Vanderbeck*, etc. (*supra*) as applicable to work and labor, as where a machine is manufactured for the vendor. 3

But here it is not averred that the machines were to be manufactured for defendant. The affidavit specifies only an agreement to sell and deliver, *non constat*, but from an existing stock of machines. It is not necessary, therefore, to consider the other points, as, for the reasons given, the plaintiff has not shown by affidavit that he is entitled to recover the sum stated.

Motion granted, with costs.

NOTE ON THE SELLER'S ACTIONS ON THE CONTRACT OF SALE.

The distinction between a contract for sale and one for production or manufacture is important by reason of the fact that the provision of the Statute of Frauds as to sales does not apply to the latter, and the provision as to contracts by their terms not to be performed within one year, is not likely to apply to the former. If the contract of a portrait painter were deemed a contract of sale because the property in the canvas and the oils and pigments thereon must sooner or later pass to the sitter, the statute might be fatal to an oral contract by reason of the amount of the payment agreed. 1

The New York rule is to inquire whether the claimant's skill was the thing bargained for; if so, the allegation should be of services and materials found, and not of sale. *Passaic Mfg. Co. v. Hoffman*, 3 Daly, 495; *Warren Chem. Co. v. Holbrook*, 118 N. Y., 586, 593. 2

Different views prevail in some other states. See *Tiedeman on Sales*, Sec. 58.

Under a complaint for goods sold, etc., a recovery for work and labor in producing them cannot be had against objection unless it is a case for

Note on the Seller's Actions on the Contract of Sale.

- 3 amendment. *Schrimpton & Sons v. Dworsky*, 21 N. Y. Supp., 461; s. c. 2 Misc., 123; 49 State Rep., 29.

Action for price. If the goods have not only been sold but also delivered, both facts should be alleged.

If the delivery was made pursuant to agreement, not to defendant or his agent, but to a third person—as in the case of goods ordered by one as the responsible party for the benefit of another who is to receive them—it is better to allege the transaction, according to the fact, that plaintiff bargained and sold them to the defendant, and at defendant's request delivered them to the third person. But such an agreement and delivery can be proved under the usual allegation of sale and delivery to defendant, unless defendant shows that he was surprised by the variance.

- 4 *Rogers v. Verona*, 1 Bosw., 417.

If there was no delivery, the allegation should be that plaintiff bargained and sold to defendant, etc.

The three actions, one of which the seller of personal property may have against a buyer who refuses to accept the goods, are: (1) The seller may store the property for the buyer and sue for the purchase price; or (2) he may sell the property as agent for the buyer and recover any deficiency resulting; or (3) he may keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery.

- 5 These remedies apply even to such intangible or complex property as a share in a partnership; and they apply to executory as well as executed sales; but in executory sales a valid tender, and a refusal, would be necessary before the seller could sue. *Van Brocklen v. Smeallie*, 140 N. Y., 79; s. c. 35 N. E., 415, citing *Hayden v. Demets*, 53 N. Y., 426; *Dunstan v. McAndrew*, 44 N. Y., 72; *Mason v. Decker*, 72 N. Y., 595.

There are several considerations to be weighed by the attorney in advising his client which of these remedies to pursue.

- (1) If the seller sues for the purchase price—

He may elect this remedy even though the goods are perishable; he is not bound to look out for the buyer's interest and resell them (*Hunter v. Wetsell*, 84 N. Y., 549).

- 6 In this action he cannot recover storage charges on the goods, for it is urged that in storing the goods he is only preserving his own lien on them (per *McAdam, J.*, in *Dreyfuss v. Foster*, 3 N. Y. Supp. 54; s. c. 19 N. Y. St. Rep., 683).

If the seller elects this remedy, he is bound to deliver the goods whenever they are demanded, upon payment of the price (*Hayden v. Demets*, 53 N. Y., 426).

- (2) If the seller sells the property as the buyer's agent and sues for any deficiency—

The sale need not be at auction, unless that is the customary method of selling the property in question (*Van Brocklen v. Smeallie*). Whether or not the sale is at auction, notice to the defaulting buyer of the time and place of sale is unnecessary (*Pollen v. LeRoy*, 30 N. Y., 556); all that

Farley v. Browning, 15 Abb. N. C., 801.

the buyer can require is that the seller shall be diligent to obtain the best price possible for the goods, and that the sale shall be within a reasonable time (*Sherwood v. Ribbons*, 6 N. Y. Week. Dig., 231). The sale need not be in the name of the buyer (*Smith v. Pettie*, 70 N. Y., 13), and if it is at auction the buyer will not be deemed injured by the mere fact that the seller bought in the property by bidding higher than anyone else (*Austin v. Hartwig*, 49 Super. Ct. [N. Y.], 256). 7

In this action the seller may recover any expenses incurred in keeping the property (*McEachron v. Randles*, 34 Barb., 301); including expense of insuring it (*Lewis v. Greider*, 51 N. Y., 231).

(3) Where the seller keeps the goods and sues for the difference in price—

He may deliver the same goods to other parties on contracts made prior to that with the buyer, and the price received on such contracts is no evidence of the market value of the goods (*Canda v. Wick*, 100 N. Y., 127). 8

Whichever remedy the seller elects to pursue, his election once made binds him. Having adopted one remedy, he cannot afterwards recede from the position taken and pursue a different remedy (*Bradford v. Crocker*, 60 N. Y., 627; *Dreyfuss v. Foster*, *supra*).

FARLEY v. BROWNING.

New York Common Pleas, General Term; January, 1885.

[Reported in 15 Abb. N. C., 801.]

1. Although one who has performed a special contract for work and materials may recover the stipulated price without pleading the contract, provided it has been fully performed so that only the duty to pay the money remains, yet he must prove performance of the contract, whether he sues for work, etc., generally, or pleads the special contract. ✓
2. Where he sues without setting up the special contract, an admission in the answer, that he had done work and furnished materials (there being a denial of value), does not excuse him from proving that he had done all the work required by the special contract produced in evidence, nor preclude the defendant from giving evidence to the contrary.

Appeal from a judgment for the plaintiff, entered on the verdict of a jury at the Special Term, and from an order striking out defendant's counterclaim. 1

The action was brought by Patrick Farley against William H. Browning, in the Seventh District Court of New York city, and was removed under the statute to the Court of Common Pleas.

Farley v. Browning, 15 Abb. N. C., 301.

2 The complaint alleged :

" I. That heretofore and on and between February 24, 1882, and October 31, 1882, the plaintiff performed certain work, labor and services for the defendant, in the digging and excavating of certain trenches on the north side of Sixty-third street, between Fourth and Madison avenues, in the city of New York, for the purpose of erecting certain houses thereon, and also furnished, at defendant's request, materials, to wit : building stone, to be used in the erection of said houses.

3 " II. That said materials so furnished, and labor and services performed, were reasonably worth the sum of \$2,200, which the defendant promised and agreed to pay therefor.

" III. That defendant has paid on account thereof, the sum of \$2,000, leaving a balance due and owing plaintiff from defendant of the sum of \$200, no part of which has been paid, though duly demanded."

The answer of defendant set forth :

" I. He admits the 1st allegation or paragraph of said complaint as therein alleged.

4 " II. He denies the 2d allegation or paragraph in said complaint.

" III. He denies the 3d allegation or paragraph of said complaint."

The fourth paragraph of the answer also pleaded for a separate defense, that plaintiff had entered into a written contract with defendant, annexed to the answer, and that he had failed to perform it, and made a counterclaim therefor. The matter pleaded in the fourth paragraph, " and constituting counterclaims against the plaintiff," was stricken out on motion, on the ground that

5 defendant could not, at least without leave of court, interpose new defenses to those interposed in the District Court.

The jury found for the plaintiff, and from the judgment entered thereon defendant appealed.

VAN HOESEN, J. The error in the charge of the judge was caused by a misconstruction of the pleadings. The answer does not admit that the work for which a special contract had been made had been duly performed ; it merely admits that the plaintiff had done work and furnished materials for, and at the request

of the defendant. The judge erroneously construed the answer 6
as making an admission that the plaintiff had done all the work,
that the written contract that was produced in evidence (though
it had not been mentioned in the complaint), required him to do.
In consequence of this misconstruction of the pleadings, the
judge fell into the error of instructing the jury, "that the ques-
tion to be decided is, not whether the work was done or not, but
whether a promise was made. If the jury find a promise was
made, the plaintiff is entitled to a verdict."

In point of fact, the chief question in the case was, has the 7
plaintiff fully performed the work mentioned in the written
contract? The plaintiff declares on one of the common counts
in *assumpsit*. This he had a right to do, provided that he had
fully completed the special contract. The rule is that *indebitatus*
assumpsit will lie to recover the stipulated price due on a special
contract, where the contract has been completely executed, so
that only a duty to pay the money remains. It is essential that
the plaintiff should prove that the special contract has been per-
formed upon his part (*Jewell v. Schroepel*, 4 Cow., 566; *Farron*
v. Sherwood, 17 N. Y., 227; *Hosley v. Black*, 28 N. Y., 438; 8
Hurst v. Litchfield, 39 N. Y., 377; *Higgins v. Newton, &c. R.*
R. Co., 66 N. Y., 605).

The plaintiff undertook to prove performance, and he offered
evidence for that purpose. The defendant then offered to prove
that the work had never been finished. The court ruled that he
could not be allowed to show that the contract had not been per-
formed, but notwithstanding that ruling, the defendant was
afterwards permitted to give a good deal of testimony to show
that the plaintiff had failed to do the work that the contract had 9
provided for. It might perhaps be said that the action of the
court in allowing the defendant to prove that the contract had
not been performed, obviated the exception taken to the ruling
that such proof could not be admitted, but there is still the
exception taken to the instruction to the jury, that it was of no
consequence whether the contract had been performed or not.
This instruction was, as I have said, erroneous, and because of it,
judgment must be reversed.

In his note to *Cutter v. Powell* (2 Smith's Lead. Cas.), Mr.

Schencke v. Rowell, 3 Abb. N. C., 342.

- 10 Wallace says, "where there has been a special contract, the whole of which has been executed on the part of the plaintiff, and the time of payment on the other side is passed, a suit may be brought on the special contract, or a general assumpsit may be maintained; and in the last case the measure of damages will be the recompense fixed by the special contract. If, however, the special contract be open, and there be no fault or omission on the part of the defendant *indebitatus assumpsit* will not lie."

- 11 The plaintiff cannot free himself from the obligation of proving his case, by changing the form of his pleading. If he sues upon the special contract, he must prove performance, and so he must do, if he resorts to an *indebitatus assumpsit*.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

DALY, C. J., and LARREMORE, J., concurred.

Judgment reversed.

NOTE.—In *Atkinson v. Collins*, 9 Abb. Pr., 353, the complaint alleged services generally, defendant setting up that the work was done under a special contract. It was proven at the trial that a special contract had been entered into, which provided that, when the work was completed and accepted by certain school officers plaintiff was to be paid; it was also proven that the work had never been accepted by such officers. *Held*, that the complaint was properly dismissed.

SCHENCKE v. ROWELL.

New York Common Pleas, General Term; June, 1877.

[Reported in 3 Abb. N. C., 342.]

1. A complaint in an action on a contract in which the determination of a third person on a question between the contracting parties is a condition precedent—*e. g.*, on a building contract containing the usual requirement of an architect's certificate—is bad on demurrer if it does not allege the making of such determination, or sufficient ground for dispensing with it.
2. Where a building contract requires the approval of the work by the architect and his certificate to that effect, the performance of the work and the production of the certificate are both prerequisites to any recovery, unless withheld by "fraud," or "collusion," or "in bad faith." A formal approval and acceptance by the architect without a certificate are not enough.

Schencke v. Rowell, 3 Abb. N. C., 3427.

3. The allegation in a complaint that an architect's certificate is "unreasonably" withheld by him, is not a sufficient justification for not obtaining it.
4. Nor is a mere allegation of plaintiff's complete performance or of defendant's acceptance of the work sued for, enough to dispense with alleging a certificate.
5. The architect's acceptance of any substitute for that which the contract called for, if substantially variant from its terms, unless by authority of the employer, is not enough to sustain an action; and even the employer's acceptance of inferior or different work must be supported by some new consideration, as, for example, an agreement to accept such inferior work with deductions for defects agreed upon, in order to be deemed as part or entire performance.

William M. Schencke sued George P. Rowell and Charles N. 1
Kent to recover an alleged balance of \$550, on a building contract, whereby the plaintiff was to erect a building on the Centennial grounds, in the city of Philadelphia, for the defendants; and also to recover \$528.41 for extra work and materials furnished about said building.

The amended complaint alleged :

"That on or about February 24, 1876, plaintiff and defendant entered into an agreement of which a copy is hereto annexed, marked 'Schedule A,' and hereby made a part of this com- 2
plaint."

"That the plaintiff duly performed and fulfilled all the conditions and requirements of said agreement, to be by him performed by the terms thereof."

"That the plaintiff has requested the architect in said agreement mentioned, to give the certificate mentioned in said agreement, but said architect unreasonably neglects and refuses to give the same."

"That the defendants have duly accepted the work performed 3
by the plaintiff under and by virtue of said agreement, &c., and that they had paid \$6,000 on account thereof."

There was also a second cause of action for extra work and materials.

"Schedule A," referred to in the complaint, was an agreement for building, in the usual printed form, with special provisions added in writing, and was under seal. It provided that the

Schencke v. Rowell, 8 Abb. N. C., 3427.

- 4 plaintiff would "on or before the first day of May, 1876, well and sufficiently erect and finish the new building on the Centennial grounds, agreeably to the drawings and specifications made by M. J. Morrill, and signed by the said parties and hereunto annexed, within the time aforesaid, in a good, workmanlike and substantial manner, to the satisfaction and under the direction of the said M. J. Morrill, to be testified by a writing or certificate under the hand of the said M. J. Morrill," for \$6,550.

5 It further provided for payments, as follows, viz.: 1st. When the frame was raised, \$800; 2d, when enclosed, \$1,500; 3d, when finished, except boxes and painting, \$1,700; 4th, when completed and accepted, \$2,550.

"Provided, that in each of the said cases, a certificate shall be obtained and signed by the said M. J. Morrill."

Then followed provisions as to alterations, extra work, etc., not material to the decision.

The defendants demurred to the first cause of action (stated above), on the ground that it did not state facts sufficient to constitute a cause of action.

- 6 *At Special Term* this demurrer was overruled, and judgment ordered for plaintiff, with leave to defendants to amend on terms.

Defendants appealed from this order.

The General Term reversed the order.

- 7 ROBINSON, J. In contracts for the performance of work under the supervision of an architect, which, to entitle the contractor to payment for work done, not only require its completion according to the terms of the contract, but also its approval by, and a certificate of, the architect to that effect, the performance of the work and the production of the certificate are both prerequisites to any recovery.

A formal approval and acceptance of the architect "would not relieve the plaintiffs from their agreement to perform the work according to the plans and specifications" (*Glacius v. Black*, 50 N. Y., 150).

While the architect's certificate is thus made essential and is otherwise indispensable to any right of recovery, its non-

Schencke v. Rowell, 3 Abb. N. C., 3427.

production may be excused when withheld by *fraud* or *collusion*, 8
or *in bad faith* (Thomas v. Fleury, 26 N. Y., 26; Barton v.
Hermann, 11 Abb. Pr. N. S., 378).

The requirement of such certificate being for the benefit and
protection of the employer, he may by some definitive or
expressive act, waive the necessity for its production. A mere
allegation of his *acceptance* of the work done has no legal
significance. Everything done in the progress of the work
contracted for, if known to or recognized by the employer, is to
be deemed accepted in part performance; and notwithstanding 9
any such allegation as is made in the present case, "that the
defendants duly accepted the work performed by plaintiff under
and by virtue of said agreement," the complaint presents no
suggestion that the entire work as performed was accepted as a
full compliance with the requirements of the contract.

Without this, no waiver of an architect's certificate of com-
plete compliance (so far as it gave assurance of the fact) could
be deemed to be made.

This action was brought to recover a part (\$550) of the last
and final payment of \$2,550, which was to be made when the 10
whole work was "completed and accepted," and it is true such
completion and acceptance is alleged in these precise and
general terms, but as to the certificate of the architect as to this
final payment that the work had been so completed "*in a good,
workmanlike, and substantial manner, to his satisfaction and
under his direction,*" as required by the contract, none such is
alleged to have been given.

The certificate of the architect being indispensable to any
recovery (so far as material), unless withheld for *fraud* or
collusion or *in bad faith*, the allegation that it was so withheld 11
"unreasonably," has never been accepted as a justification for
its non-production. Every principle upon which the architect's
determination and adjudication in this respect is deemed
operative under the contract, rejects any such "*unreasonable*"
action as without the consideration of the parties, or the
obligations of their contract. The architect, so far as it commits
any matter to his judgment, is accepted as an *umpire* between
them (Smith v. Briggs, 3 Den., 73; Butler v. Tucker, 24 Wend.,

Schencke v. Rowell, 8 Abb. N. C., 3427.

12 449; Wyckoff v. Meyers, 44 N. Y., 145), and his mere refusal, when his impartial judgment dictates it, confers upon the contractor no right of recovery, even if, by other witnesses, he should be able to maintain that he had substantially performed the work.

13 The best judgment of the architect upon the matter so committed to his determination has been agreed upon as the test of the performance; and neither party can reject or repudiate his certificate given on the one side or his refusal to give it on the other, upon mere allegations or testimony tending to show that his action had been unreasonable." His entire refusal to act would throw upon the courts the duty of acting in his stead; but until divested of the power as conferred upon him by the parties, by death, incapacity, resignation or *estoppel to act*, the parties have agreed to accept either his certificate or his refusal to certify to the work done by the contractor as a final judgment between them. Under these considerations the complaint was defective in substance.

14 *First.* The mere allegation of complete performance of the work did not confer any right of action for want of the architect's certificate.

Second. This was not supplied by the averment that the architect had "*unreasonably*" refused such certificate.

15 *Third.* The mere allegation that the defendants had duly accepted the work performed by plaintiff under and by virtue of said agreement added nothing in extenuation or avoidance of the necessity of such certificate, without further allegation that such work was so accepted, not only in compliance with the contract, but *was also received as a full performance* (*Glacius v. Black*, 50 N. Y., 153).

The acceptance by the architect of any substitute for that which the contract called for, if substantially variant from its terms, could not be justified (except through authority of the employer), nor can the acceptance by the employer of inferior or different work than such as was contracted for be deemed or accredited as part or entire performance, except upon some new consideration, operating between the parties; any agreement to accept any such imperfect or incomplete work with deductions

Hosley v. Black, 28 N. Y. 438.

for defects agreed upon, would be binding (*Glacius v. Black*, 16 *supra*).

But without it, the idea that the mere declarations of an intention or purpose to waive any right to damages already accrued is wholly unavailable as a defense thereto or as against the assertion thereof.

Under these circumstances it follows that the complaint was defective in the foregoing particulars.

The order overruling the demurrer should therefore be reversed and judgment given for the defendants, unless the plaintiff within twenty days from the service of a copy order to be entered herein, amend his complaint and pay the costs of the trial on the demurrer and of this appeal (to be taxed by the clerk), and for failure to so amend and pay such costs that defendants have judgment final. 17

C. P. DALY, Ch. J., and J. F. DALY, J., concurred.

HOSLEY v. BLACK.

New York Court of Appeals, 1863.

[Reported in 28 N. Y., 438.]

1. In an action on contract, if the complaint alleges performance by plaintiff of the conditions on his part, and he proves substantial performance, a waiver of strict performance may be proved, amendment for that purpose being allowed by the court; terms to be imposed if necessary in furtherance of justice.*
2. If the complaint is general, for services, the contract being used as evidence only, amendment is not necessary to let in evidence of such excuse.

Plaintiff sued for services of himself and wife in teaching 1 school.

The complaint (which was modelled on the common law forms of declarations *in assumpsit*) for a *first* cause of action, charged that the two defendants, with another person named, were trustees of a specified school district at a time named, and

* Compare *Crandall v. Clark*, 7 Barb. 169; *Holmes v. Holmes*, 9 N. Y., 525; *Lester v. Jewett*, 11 N. Y., 453; *Wheeler v. Garcia*, 40 N. Y., 584; *Smith v. Poillon*, 87 N. Y., 590; *Woolner v. Hill*, 93 N. Y., 576.

Hosley v. Black, 28 N. Y., 438.

- 2 employed plaintiff to teach school in their district, with his wife as assistant, for a specified period and compensation, and alleged performance on his part, and that the third person, not joined as defendant, had ceased to be a trustee.

The *second* count alleged generally that defendants were indebted for services rendered by himself and wife [*in respect of the same period*], and repeated that the third person not joined had ceased to be trustee.

The *other* counts it is not necessary to state.

- 3 *On the trial* defendants moved to dismiss on the ground that one Richardson, the present third trustee, was a necessary party. Plaintiff had a verdict.

The Supreme Court at General Term, upon substantially the same grounds as those assigned by the Court of Appeals in the following opinion, affirmed judgment on the verdict. Defendants appealed.

The Court of Appeals affirmed the judgment.

- 4 BALCOM, J. The objection to the evidence given by the plaintiff to show that the defendants consented that Saturdays should be counted in ascertaining the length of time the plaintiff taught the school, was placed upon the ground that it was not competent to show a waiver of the performance of the contract to teach the school, under the allegations of the complaint.

- The technical rule undoubtedly is, that under a complaint setting out a contract and averring its performance by the plaintiff, evidence in excuse for non-performance is not admissible. (*Oakley v. Morton*, 11 N. Y., 25.) But this rule is of very
5 little consequence; for the plaintiff may amend his complaint and then give the evidence. (Code, § 173; *Dauchy v. Tyler*, 15 How. Pr., 399.) It is true that he must submit to such terms "as may be proper;" but terms are not often imposed for they are seldom necessary in the furtherance of justice.

In this case no amendment of the complaint was necessary to entitle the plaintiff to give the evidence excusing him from opening the school on Saturdays. The complaint contains seven distinct claims or counts, three of which are similar in substance

to the count of *indebitatus assumpsit* for work and labor, used prior to the Code of Procedure. That count always was sufficient to authorize a recovery for work and labor performed under a contract not under seal, unless the party performing the work and labor had failed to fulfill the contract. (4 Wend., 285; 11 *id.*, 479; 22 *id.*, 576; 1 Cow. Tr., 2d ed., 124; 2 *id.*, 635 and 1128.) This court held in *Farron v. Sherwood* (17 N. Y., 227), that the Code has not changed the former rule of pleading; that a party who has wholly performed a special contract on his part may count upon the implied assumpsit of the other party to pay the stipulated price, and is not bound to declare specially upon the agreement. The same rule was held in the following cases: *Allen v. Patterson* (7 N. Y., 476); *Keteltas v. Myers* (19 N. Y. R., 231); *Moffet v. Sackett* (18 *id.*, 522.) The plaintiff taught the school thirteen weeks for the first three months, and twenty-six weeks for the last six months. This was time enough to make the two terms, construing the word month to mean a calendar and not a lunar month, as the statute seems to require. (1 R. S., 606, § 4.) The fact that the plaintiff's wife was absent Monday mornings washing till ten or eleven o'clock in the forenoon, and a few days while sick, and that the plaintiff himself was absent one day attending a Buchanan mass meeting, and two days before the board of supervisors as candidate for county commissioner of schools, his wife keeping the school in his absence was not a substantial breach, by the plaintiff of the contract to teach either three months or six. This was a trifling matter. The school was kept during the time either the plaintiff or his wife was absent. Both were not away at the same time, and the attention of the judge was not particularly called to these absences at the trial; nor was it shown during which term they occurred. I am therefore of the opinion the judge was right in holding that the plaintiff performed the contract on his part.

The defendants were the only trustees of the school district at the time the action was commenced; and there was no evidence given that Thomas Richardson had become a third trustee at the time of the trial, and it was not conceded by the plaintiff that he was such trustee. The complaint showed upon the face

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10 thereof that the action was brought against only two trustees. But the defendants did not demur to it on that ground, or object in their answer on that ground to the plaintiff maintaining the action. The objection that a third trustee should have been made a defendant was therefore waived. (Code Pro., § 144; *id.*, 147.)

[Remarks overruling some other objections to evidence are here omitted.]

All the judges concurred, except SELDEN, J., who dissented as to some of these latter questions of evidence.

PARRY v. AMERICAN OPERA CO.

New York City Court, General Term, 1887.

[Reported in 19 Abb. N. C., 269.]

1. A servant who is wrongfully discharged from employment before the term for which he was hired expires, his wages having been paid in full up to his discharge, has but one cause of action for breach of the contract of hiring, and can have but one recovery of damages therefor.
 2. Where plaintiff was hired for twenty-five weeks, and was discharged after eight weeks' service,—*Held*, that a recovery of judgment for the damages sustained for the two weeks following his discharge, barred any further action for damages for the remaining fifteen weeks for which he was hired, although his services, if they had been rendered, were to be paid for in weekly installments.
- 1 Appeal from a judgment entered upon a verdict for the plaintiff directed by the court at the trial.

William Parry sued the American Opera Company, Limited, for damages for breach of a contract, alleging that the defendant engaged him to act as its assistant stage director during the operatic season of 1886–7, for twenty-five or more weeks, beginning in October, 1886; that on December 11th he was discharged, after eight weeks of service, and suffered damage including the loss of salary, for the remaining seventeen weeks. The complaint admitted that since his discharge plaintiff had recovered judgment against defendant “for two weeks of said salary to December 25th, 1886.”

At the trial the defendant put in evidence the judgment roll 3
in the prior suit between the parties, the complaint therein
showing that after his discharge he had tendered his services to
defendant, which were refused; that he was unable to procure
other employment, and demanding "judgment for the salary due
and owing him for the said two weeks under said contract," etc.

The demand of the complaint in the present action was "for
the damages so caused by the wrongful refusal to fulfill the said
contract, and for all loss and injury resulting to him there-
from," etc.

Defendant's request to direct a verdict in its favor was 4
refused, and thereupon plaintiff's motion for a direction in his
favor was granted.

From the judgment entered upon the verdict, defendant
appealed.

McADAM, Ch. J. Services were actually rendered under the
contract of employment until December 11, 1886, to which time
salary was paid. The plaintiff was on that day discharged, by
means of which he was prevented from rendering any further 5
services under his contract.

The plaintiff's appropriate remedy under such circumstances
was an action for wrongful discharge, founded on the breach by
the defendant (*Moody v. Leverich*, 4 Daly, 401, 408; *Howard v.*
Daly, 61 N. Y., 362; s. c. 19 Am. R., 285), in which form of
action he is entitled to recover "for the loss or injury occa-
sioned" up to the time of trial (*Bruell v. Colell*, 1 City Ct. R.,
308; *Everson v. Powers*, 89 N. Y., 527).

The cause of action arose at the time of the wrongful dis-
charge, and there can be but one recovery for the breach, 6
although the services (if they had been rendered) were to be paid
for in weekly installments. One action is sufficiently compre-
hensive to embrace all the damages suffered, and the law will not
permit the cause of action to be split up into parts so as to
permit of a number of suits for substantially the same cause.
The plaintiff herein recovered a judgment on the contract for the
loss from December 11, 1886 (the day of the discharge), up till
December 25, 1886. This recovery was founded on the breach

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- 7 because it was conceded by the printed case that no services whatever were rendered during this period. The judgment so recovered is a complete bar to any further recovery founded on the same breach, that is, the wrongful discharge (see cases before cited).

The request to direct a verdict for the defendant should have been granted. It was error to have directed a verdict for the plaintiff. For this error the judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

- 8 BROWNE and HALL, JJ., concurred.

- NOTE [from 1 Univ. Law Rev., 52.].—The right of a servant to recover for a breach of the contract of service is ably discussed in *Olmstead v. Bach* (Md., 1898), 27 Atl. Rep., 501. The court holds that a contract of hiring for a year is an entire contract, which is not rendered divisible by a subsidiary provision for weekly payments. The employee under such a contract, upon a wrongful discharge before the expiration of the year, has only two [independent] remedies at law. He may treat the contract as continuing and bring an action against the master for breaking it by discharging him, and this action lies whether his wages are paid up to the time of his discharge or not; or if his wages are not paid up to the time of his discharge, he may treat the contract as rescinded, and sue his employer on a *quantum meruit* for the services *actually rendered*. When the servant's wages have been paid in full up to the time of his discharge, as in the case at bar, he has no option as to which of these remedies he may pursue. He is confined to an action for the recovery of damages which he has sustained by a breach of the contract; whether he brings his action immediately upon his discharge, or waits until the period of the contract has expired, his action is an action for a breach of the contract. The measure of damages will be the loss or injury occasioned by that breach, and one recovery on such claim, whether the damages be denominated "loss of wages" or "damages for breach" is a bar to a future recovery.
- 10 The rule is stated to be different where there has been no dismissal of the servant, and the only breach of the contract consists in the failure of the master to pay, when due, the wages or installments of wages actually earned. In such a case, the contract not having been broken by the dismissal of the servant, and he not having been prevented from performing his work, and the relation of master and servant still continuing, an action on the contract could be maintained to recover the salary or wages due for a past stated period. Recovery in such an action would not be a bar to a future recovery for a subsequent dismissal. But to hold that an action brought by the servant after dismissal, his wages having been paid in full until his dismissal, is an action for wages, and so not a bar to a future recovery for dismissal, would be to hold that the servant is en-

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titled to recover for "constructive services," a doctrine repudiated in England, where it had its origin, as well as in this country, and declared in *Howard v. Daly*, 61 N. Y., 362; s. c. 19 Am. R., 285, to be "so opposed to principle, so clearly hostile to the great mass of authority, that it cannot be accepted."

The same rule has been applied in New York, in *Parry v. American Opera Co.* (the case in the text), and in Ohio in *James v. Allen County*, 44 Ohio St., 226; s. c. 25 Am. L. Reg., 521, cases nearly parallel to *Olmstead v. Bach*.

The result of the authorities may be stated thus:

(1.) If before services have been rendered or wages earned under the contract, the employer discharges or refuses to receive the employee, the latter cannot sue for wages, but his remedy is only for damages by breach of the contract. 12

Howard v. Daly, 61 N. Y., 362.

(2.) If after services have been rendered and paid for, the employer wrongfully dismisses the employee before any further services have been rendered, the remedy is the same, only an action for damages.

Olmstead v. Bach, *supra*.

Keedy v. Long, 71 Md., 392; 18 Atl. Rep., 704.

(3.) If, after services have been rendered which *all remain unpaid for*, the employer wrongfully discharges the employee, the latter may either, (a) treat the contract as rescinded and sue for the value of his services, which would not then be controlled by the limit of rate fixed by the contract, for he would be entitled to recover a *quantum meruit*; or, (b) he may sue on the contract for wages for services actually rendered (in which case he is bound by the contract rate), and he may also bring a separate action, or join in the same action, his demand for damages for the wrongful discharge. 13

Olmstead v. Bach, *supra*.

Perry v. Dickerson, 85 N. Y., 345.

(4.) If, after services have been rendered, *some of which have been paid for, and others remain unpaid for*, there is a wrongful discharge, the remedy is to sue on the contract for those unpaid for, and to join in the same action, or bring a separate action for, the demand for damages for wrongful dismissal. 14

Perry v. Dickerson, 85 N. Y., 345.

The cause of action for wages under the contract, and that for wrongful dismissal are distinct (*id.*).

Recovery of damages for wrongful dismissal only, does not bar a subsequent action for wages previously earned under the contract by services actually rendered (*id.*).

But there can be but one recovery for damages for a wrongful dismissal; and all the damages up to the time of trial may be included.

Olmstead v. Bach, *supra*.

Parry v. American Opera Co. (in the text).

Bank of British North Am. v. Delafield, 126 N. Y., 410.

BANK OF BRITISH NORTH AM. v. DELAFIELD.

New York Court of Appeals, June, 1891.

[Reported in 126 N. Y., 410.]

1. *It seems*, that the rule that an action of a legal nature cannot be maintained by a portion of a firm against another member, for breach of contract or for wrongful act on the part of the latter until after a final accounting and balance struck between them, and an express promise to pay—does not preclude an action by a portion of the firm to recover a loan of firm money made to one member of it; for the law upon an ordinary simple loan even to a partner, implies a promise to pay it at the time stated or upon demand, without going into an accounting.
2. Even were it otherwise, if on the trial of the action the accounts are examined sufficiently to show that the defendant is indebted to the firm in a much larger sum than the loan sued for, the action can be maintained.
3. *So held*, even where the action was by an assignee of the demand, it not being claimed that a full accounting in which all the partners should be parties would show a different state of indebtedness.

1 Action to recover for money lent.

The allegations of the complaint were :

That on or about the month of December, 1887, the firm or co-partnership of Wm. T. Coleman & Co., of San Francisco, advanced and lent to the defendant at his request the sum of \$25,000.

That on April 26, 1888, said sum had not been repaid by the defendant, and was then due and owing from the defendant to said firm, and on that day the said firm duly assigned and transferred said indebtedness to this plaintiff.

- 2 That on May 4, 1888, the plaintiff gave the defendant due notice of said assignment, and on that day duly demanded payment of said sum of \$25,000 from the defendant, but no part thereof has been paid, and there is now due and owing from the defendant to the plaintiff the sum of \$25,000, with interest from May 4, 1888.

WHEREFORE, etc.

Upon the trial it appeared that defendant (residing in New York) was a member of the California firm of Wm. T. Cole-

Rank of British North Am. v. Delafield, 126 N. Y., 410.

man & Co. He requested of his firm leave to draw \$25,000, but 3
the other partners refused; they however offered to lend him
that sum. Thereafter he drew a check in the firm name for
that sum and deposited it to his own credit in his personal bank
account. He now claimed that the transaction was not a loan,
but was drawn by him as matter of right, on account.

At Circuit, plaintiff had a verdict.

The Supreme Court at General Term affirmed the judgment
thereon. Defendant appealed to the Court of Appeals.

PECKHAM, J. Upon the question whether the money which 4
the plaintiff seeks to recover was a loan to the defendant from
the firm of which he was a member, or was money drawn by
him under a claim of right from the firm treasury in New York,
we think there was evidence to warrant a finding that it was a
loan, and was so received by the defendant.

The learned trial judge found that it was a loan. No time
was specified for its repayment, and it became due upon demand.

The defendant claims that no action at law by a portion of a 5
firm can be maintained in case of a breach of contract and of a
wrongful act by another member against such other member,
unless upon an express promise to pay and after a final account-
ing and a balance struck. This may be true; but the case is one
where the member sued has been guilty of a wrongful act, and
a breach of his duty, and has, for instance, converted funds to
his personal use by payment of his debts, which belonged to the
firm. These are the general characteristics of the cases cited by
the defendant's counsel.*

Here is a case, however, where a loan of money belonging to 6
the firm had been made to one member of it, and the law, upon
an ordinary simple loan, even to a partner, implies a promise to
pay it at the time stated, or upon demand, without going into an
accounting. The cases where an express promise to pay has
been required were those where from the facts no implied
promise to repay would be raised, excepting upon an accounting
and a balance struck.

* See *Payne v. Freer*, 91 N. Y., 43; *Richardson v. Bank of England*,
4 Myl. I. & C., 165; *Bouton v. Bouton*, 40 How. Pr., 217.

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- 7 Thus Judge ALLEN, in *Crater v. Bininger* (45 N. Y., 545 at 548), says that an action will not lie by one member of a partnership against another upon an implied promise, and if the plaintiff had paid the demands against the firm he could not have maintained an action against his associates upon the implied promise to repay him. In such case the promise implied is to repay the amount that may be found due after an accounting. But one partner can maintain an action against his copartner upon an express promise, although connected with partnership business.
- 8 He refers to *Gridley v. Dole* (4 N. Y., 486), which was a case where one of two partners, after a dissolution, advanced money to the other upon his promissory note, to pay partnership debts, the assets of the late firm being in the hands of the member receiving the money. It was held he could recover upon this express obligation to repay, but if no such obligation had been taken, it would have been the case of one partner advancing money to pay, or paying demands against the firm, and in such case he could not recover back the whole or any part of the money in an action against his copartners, because the action
- 9 would be upon an implied promise, and that implied promise was only that the other partners would pay what was due him after an accounting had been taken to ascertain the state of the partnership matters, and the balance, if any, that might be due him. Where, however, the facts proved raise an implied promise to repay upon demand the very sum which has been loaned, I think an action can be maintained thereon just as well as upon an express promise to do the very thing which the law implies without such express promise.

- 10 But be that as it may, we have here the further facts that the indebtedness from the defendant to the firm was assigned by it to the plaintiff, and upon the trial an examination into the firm accounts was had so far as to show the defendant indebted to the firm in a sum largely in excess of the money sued for by the plaintiff. That an assignee could recover upon the indebtedness arising from the loan, after proof of the state of the partnership accounts, and that defendant was indebted to it in a greater sum than the amount assigned, can admit of no doubt. In our union of legal and equitable remedies in the same tribunal, and after

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what may be termed an examination in the nature of an account- 11
ing has been had, it is a matter of no importance that it was
carried on in what would be termed an action at law. There is
no claim now made that there has been but a partial accounting
or that in consequence of such partial accounting the defendant
has been found indebted to the firm in a greater sum than would
have appeared if a full and complete accounting had been had,
and greater than will appear when a full and complete account-
ing comes to be had between the members of the firm in an
action wherein they are all parties and where the judgment will 12
bind them all. We think the plaintiff showed enough to main-
tain its action in this respect.

These views would lead to an affirmance of the judgment
were it not for the erroneous admission of one piece of evidence
which we see no available answer to.

[*After discussing the question of evidence.*]

Judgment reversed and a new trial ordered, for error in the
admission of evidence.

NOTE.—In *Esdaile v. Wuytack*, 25 Abb. N. C., 474, *Held*, error to dis- 13
miss—on the ground that an action at law would not lie—a complaint
alleging a dissolution by mutual consent of a former partnership, between
plaintiff and defendant, an agreement that all partnership liabilities
should be borne and paid equally, and that plaintiff had paid all the part-
nership liabilities; and seeking judgment against the defendant for his
half thereof. The court held that the action did not involve investiga-
tion or settlement of the affairs of the partnership.

Hoboken Beef Co. v. Loeffel, 23 Abb. N. C., 93.

HOBOKEN BEEF CO. v. LOEFFEL.

New York Supreme Court, General Term, 1889.

[Reported in 23 Abb. N. C., 93.]

1. Arrest may be ordered, under Code Civ. Pro., § 549, as amended in 1886, in an action on contract, if a fraud such as is mentioned in the statute be also alleged, although not with damage.
 2. The fact that the pleader, after stating a cause of action on contract, adds, in compliance with that provision, allegations showing a fraud which is ground for arrest, does not change the nature of the cause of action, but will avail to sustain the arrest.*
- 1 Appeal from an order denying a motion to vacate an arrest.

VAN BRUNT, P. J. The appellant in his points has stated the ground of the motion to set aside the order of arrest obtained herein to be that the complaint states a cause of action on contract and does not allege fraud with damage.

*NOTE ON INCIDENTAL ALLEGATIONS OF FRAUD.

- This question is one of much practical importance, and has hung in doubt in the minds of many of the profession since the recent amendment requiring the complaint to state the facts constituting the ground of arrest.
- 2 The decision in the text seems clearly to accord with the words of the statute; and it will be found to accord also with justice to suitors and the convenience of the profession, when the results which would follow any other decision are traced out, as indicated in 2 Abb. New Pr. & F., 355, note.
- A similar principle is applied where a plaintiff has occasion to allege a fraud of defendant, not for the purpose of obtaining arrest, but by way of anticipating and avoiding a bar which defendant could otherwise rely on; as where the defendant induced plaintiff to take notes on time, by false representation, and plaintiff sues without delay, and alleges the false representations as entitling him to do so. Here his action is on contract solely, notwithstanding he alleges and must prove the fraud. *Wiegand v. Sichel*, 4 Abb. Ct. App. Dec., 592; aff'g 34 Barb., 84; *Roth v. Palmer*, 27 Barb., 652 and cases cited. So where he sues for money paid by him under an executory contract, and alleges fraud as the ground on which he is entitled to rescind and to recover on the implied contract to repay. In all such cases his cause of action is on contract, although he may be bound to prove the fraud in order to recover.
- 3 So also where he sues for price of goods and alleges breach of the buyer's stipulation to give notes, as a reason for not waiting the expiration of the term of credit, his action is not thereby made one for the breach of that stipulation, but is still only an action for the price of the goods. See *Lee v. Decker*, 6 Abb. Pr. N. S., 392; *Wills v. Simmonds*, 8 Hun, 189.

In view of this statement of the ground upon which the appellant founds his motion, it is not at all necessary to consider the allegations contained in the complaint, because he concedes that if an order of arrest may be obtained in an action upon contract, which does not allege fraud with damage, this appeal is not well taken. 4

It seems to us that a very brief consideration of section 549 of the Code disposes of the objection. That section provides that the defendant may be arrested in an action brought for either of the following causes, and subdivision 4 is as follows:

“In an action upon contract express or implied, other than a promise to marry, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability.” 5

An order of arrest may issue, therefore, in actions on contract where the cause of action is simply on contract; but in such cases it is necessary that the complaint should contain something more, namely, an allegation that in incurring the liability on the contract which was sued for the defendant was guilty of a fraud. The action need not be to recover damages because of the fraud. 6
If the defendant was guilty of fraud in incurring the liability on contract, which forms the subject of the action, and it is so alleged in the complaint, then the right to arrest follows.

In the case at bar, the complaint sets up a cause of action for goods sold and delivered, and it also contains allegations that in order to induce the plaintiff to make such sale, and with intent to defraud it of the goods so sold, the defendant falsely and fraudulently represented to the plaintiff that he owned certain real estate in the county of Hudson, in the state of New Jersey, and that said real estate was free and unincumbered, and that the plaintiff relying upon said representations, and being deceived thereby, was induced to sell to the defendant the goods therein before mentioned; that said representations were false and untrue, and known by defendant to be false and untrue; that the defendant did not own said real estate at the time of making the representations, nor did he own any other real estate in said county. These were complete and perfect allegations of fraud, and the fact that the complaint does not seek or allege damages by reason 7

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- 8 of the fraud, does not in any way interfere with the right of arrest; because in an action upon contract, where the complaint alleges that the defendant was guilty of a fraud in incurring the liability, an order of arrest may issue. These are the allegations in this complaint. The action is upon contract, and it is alleged that the defendant fraudulently and for the purpose of deceiving the plaintiff, made certain allegations in regard to his responsibility which were false. This clearly constituted a fraud, and thereby brought the complaint within the provisions of the Code;
- 9 and the order should be affirmed, with \$10 costs and disbursements.

BARTLETT, J., concurred.

Ordered accordingly.

BLANK v. HARTSHORN.

New York Supreme Court, Fifth Department, 1885.

[Reported in 37 Hun, 101.]

1. In an action for labor and services alleged to have been performed under a special contract at an agreed price, if it appears that, from the circumstances of the case, it is doubtful whether the alleged contract can be satisfactorily established, the spirit of the Code does not prevent the adding of a count for the same labor and services upon a *quantum meruit*. For where it can be seen that the statement of each cause of action is probably needful in order to prevent a failure of justice in consequence of a variance between the pleading and the proof, such statement, provided it be plain and concise, should not be regarded as "unnecessary repetition," within the meaning of the Code.
 2. So, where there is reasonable doubt upon the facts whether plaintiff should claim as original contractor or as assignee of one who was privy to the transaction, he may, after alleging a cause of action on a contract with himself, allege the same contract as made with the third person and assigned to him.
- 1 Appeal from an order.
- Plaintiff having a claim to compensation from the defendants for pasturage, etc., of cattle, but, being uncertain as to some details of the transaction to be developed by the evidence, stated three causes of action in his complaint.

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The *first* count alleged that from about first of May, 1884, to 2
 1st January, 1885, the plaintiff pastured, fed and took care of,
 and furnished hay and other feed for, fifty-two head of cattle
 belonging to the defendants, at the defendants' request, and that
 such pasturing, etc., was reasonably worth \$600. The *second*
 count of the complaint alleged that the plaintiff pastured a like
 number of cattle belonging to the defendants, under a special
 agreement made between the plaintiff and the defendants, about
 1st May, 1884, by the terms of which the defendants agreed to
 take said cattle to the city of New York, and sell them on or 3
 before 1st October, 1884, and after deducting the purchase price
 of the cattle and the cost of transportation, to pay the plaintiffs
 two-fifths of the remainder of the proceeds of the sale.

The *third* count alleged a like agreement made between the
 defendants and one Peters, and that Peters had assigned his
 cause of action thereunder to the plaintiff.

The *Supreme Court at Special Term*, on motion of defend-
 ant, made before trial, required plaintiff to elect on which count
 he would go to trial, and to amend his complaint accordingly ; 4
 and ordered that if he failed to elect, his complaint should be
 stricken out.

The *General Term* reversed the order.

SMITH, P. J. [*after recapitulating the facts*] : " Except in one
 particular hereinafter mentioned, the three counts relate to the
 same transaction. On that ground the respondent's counsel con-
 tends that the pleading violates the mandate of the Code, that
 the complaint must contain " a plain and concise statement of
 the facts constituting each cause of action, without unnecessary
 repetition. (Sec. 481, sub. 2.) But there may be more than 5
 one cause of action arising out of the same transaction, and if
 the several causes of action are such as may be united under
 section 484, their joinder does not necessarily vitiate the com-
 plaint. Where it can be seen that the statement of each cause
 of action is probably needful in order to prevent a failure of
 justice, in consequence of a variance between the pleading and
 the proof, we think such statement, provided it be plain and
 concise, should not be regarded as " unnecessary repetition "

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- 6 within the meaning of the Code. Thus, in an action for labor and services alleged to have been performed under a special contract at an agreed price, if it appears that, from the circumstances of the case, it is doubtful whether the alleged contract can be satisfactorily established, we think that the spirit of the Code does not prevent the adding of a count for the same labor and services upon a *quantum meruit*. In the present case the first count is of that nature and it embraces a period from the 1st of October, 1884, to 1st of January, 1885, not covered by the special agreement as set out in the other two counts. Upon
7 these grounds we think the first and second counts may be permitted to stand.

- As to the necessity of the third count the plaintiff, in his affidavit used on the motion, avers that the farm on which he pastured the cattle was rented by Peters for the plaintiff's use; that the contract with the defendants set out in the complaint was first negotiated and talked over by Peters and the defendants when the plaintiff was not present, and that it will probably be a question on the trial whether the plaintiff can claim under
8 the contract, as the undisclosed principal of Peters, or as his assignee. In these circumstances we think the third count also should be allowed to stand to enable the plaintiff to present the several lines of proof upon which he relies.

- By this disposition of the matter the defendants cannot be harmed, except in being deprived of the opportunity of nonsuiting the plaintiff for a variance in proof, or of driving him to a motion for leave to amend. A special object of the Code is to remove all such meshes and pitfalls from the path of litigants. The defendants may interpose as many defenses as they have to
9 each cause of action, in the same manner and with the same effect as if such cause of action stood alone.

These views are in harmony with the cases of *Longprey v. Yates* (31 Hun, 432), decided in the old Fourth Department, and the authorities there cited. In *Velie v. Insurance Company* (12 Abb. N. C., 309, s. c. 65 How. Pr. R., 1), *WESTBROOK, J.*, speaking of the different grounds of recovery presented by the two counts in that case, said: "If either or both are tried, the proof upon each ground of recovery stated may be close and con-

Spear v. Downing, 12 Abb. Pr., 487.

flicting. A jury of twelve men may be divided in opinion as to 10 which one is established, while all may unite, some for one reason and some for another, in the conclusion that the plaintiff is entitled to recover." * And the Court of Appeals has held in a recent case, that "it is not necessary that a jury, in order to find a verdict, should concur in a single view of the transaction disclosed by the evidence; if the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that part of the jury proceeded upon one interpretation and a part upon the other." (Murray v. 11 Ins. Co., 96 N. Y., 614.)

We think the order should be reversed and motion denied, with ten dollars costs and disbursements.

BARKER, HAIGHT and BRADLEY, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied.

SPEAR v. DOWNING.

Supreme Court, Third Department; General Term, 1861.

[Reported in 12 Abb. Pr., 487.]

1. Substantial and radical defects in a complaint may be reached under the general objection in a demurrer, that it does not state facts sufficient to constitute a cause of action.
2. Section 162 of the Code of Procedure (Code Civ. Pro., § 534), which provides a mode of pleading upon instruments for the payment of money only, applies merely to instruments apparently valid on their face.
3. An instrument in the following form: "Troy, August 4th, 1846. I hereby agree to pay Miss A. Y. twenty dollars per month, during her natural life, for her attention to my son, J. S. M. (Signed) B. M." is not a promissory note.
4. Such an instrument expresses no consideration, since it affords no presumption that the services referred to were rendered in pursuance of

*In that case, plaintiff had brought an action against an insurance company, to recover an amount of insurance, alleging in one count the issuance of the policy, and in a second count a contract by defendant to insure and to issue a policy. A motion to compel the plaintiff to elect upon which count he would rely for a recovery was denied, the judge commenting upon the difficulty in deciding whether a policy had actually been issued or only an agreement to insure and to issue a policy.

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a previous request of the promisor, or that they were beneficial to him.

5. Where a consideration is not implied, or a request is essential to the defendant's liability, it must be specially averred in pleading.
 6. The rule of construing a pleading under the Code most favorably to the pleader, is not applicable in regard to the fundamental requisites of a cause of action.
- 1 Appeal by defendants from order of Special Term, overruling demurrer to complaint.

The complaint alleged that one Benjamin Marshall, in consideration of the services therein mentioned, made and delivered to the said plaintiff, then a single woman by the name and description of Miss Alice Yourt, his promissory note or instrument in writing, in the words and figures following:

TROY, August 4th, 1846.

- I hereby agree to pay Miss Alice Yourt twenty dollars per
 2 month, during her natural life, for her attention to my son,
 John Stanton Marshall.

BENJAMIN MARSHALL.

- The complaint then proceeded to allege the death of Benjamin Marshall on the 2d of December, 1858; the grant of letters testamentary to the defendant; that at the time of his death sixteen monthly payments agreed to be made by the instrument afore-
 said remained due and unpaid, amounting to the sum of \$320; that since his decease twenty-one monthly payments up to the
 1st of September, 1860, had become due and payable to said
 plaintiff amounting to the sum of \$420—no part of which has
 3 been paid though duly demanded; and demands judgment for
 both said sums of \$320 and \$420 with interest on the monthly
 installments, together with costs of the action.

The defendants demurred to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action and specified the following defects. 1. That the complaint contained no allegation of the performance or bestowment of attention. 2. Nor of the nature, extent or value of such attention, nor that it was of any value.*

*The objections need not now be specifically set forth, when the ground of demurrer is the insufficiency of the pleading. Code Civ. Pro., § 490.

The court at Special Term rendered judgment for the plaintiff 4
on the demurrer; the defendants appealed.

HOGEBOM, J. I think the complaint is not insufficient for either of the specific defects named in the demurrer. I think the fair inference is that the services or attentions had been already rendered. The omission to state their nature, extent and value, if necessary to be stated, was a defect to be reached by motion, under the section 160 of the Code, and not by demurrer.

But I think substantial and radical defects in the complaint may still be reached under the general allegation that the complaint does not state facts sufficient to constitute a cause of action. 5
(Code, § 144; *Durkee v. Saratoga R. R. Co.*, 4 How. Pr., 226; *White v. Brown*, 14 *ib.*, 282; *Haire v. Baker*, 1 Seld., 359; *Conn. Bank v. Smith*, 9 Abb. Pr., 178; s. c. 17 How. Pr., 487.)

This brings us to the question principally argued before us, to wit; whether the complaint on its face contains the elements of a good cause of action.

This depends mainly upon the construction to be given to section 162 of the Code, which provides that in an action or defence founded upon an instrument for the payment of money 6
only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due him thereon from the adverse party, a specific sum which he claims.

The instrument in question comes within the literal description of the kind of instrument mentioned in this section; for it is an instrument for the payment of money only. But obviously, something more is necessary.

It would seem that it should be an instrument on its face apparently valid, certainly one not clearly void; for then the 7
instrument would nullify itself.

This instrument is not a promissory note because it was not payable at all events. The death of Alice Yourt within a month after the date of the instrument would have defeated any recovery. (*Prindle v. Carruthers*, 15 N. Y., 430.) In the language of the Court of Appeals "it is necessary, therefore, that the promise should, from the complaint, appear to have been made upon consideration." (*Id.*)

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There is no allegation of consideration in the complaint independent of that, if any, which appears upon the face of the instrument. That consideration as alleged is "for her attention (paid or given) to my son, John Stanton Marshall."

To make defendants liable, this attention must have been bestowed either in performance of a request previously made, or must have been in its nature beneficial to the party promising, so as to operate as a reasonable and probable consideration for the promise. (*Ingraham v. Gilbert*, 20 Barb., 152; *Ehle v. Judson*, 24 Wend., 97, 98; *Goulding v. Davidson*, 28 Barb., 438; 9 *Wilson v. Baptist Ed. Soc.*, 10 Barb., 308; *Gould's Pleading*, 176, sec. 15.)

Here, certainly no request whatever is averred, and I think not necessarily or fairly implied. The instrument is quite as consistent with the idea that the services were performed without any request at all, or at the request of John Stanton Marshall, as at the request of the testator.

It seems to me that this should not be left to inference. The request is a prerequisite to the liability, and I think the pleader 10 should aver it. While pleadings are not to be condemned for want of form, and are to be liberally construed, I think substantial defects are not to be disregarded. We are not to uphold a pleading simply because a state of facts might exist against what is probable, which would justify an action.

The same considerations apply to the other alternative. I do not see that the services are presumed to have been beneficial to Benjamin Marshall. They were rendered to another person, his son, not alleged nor presumed to have been a minor, or in a situation to make it obligatory upon the father to support him.

11 If every fact fairly inferable from the terms of this writing, were spread out on the face of this complaint in the shape of distinct and positive allegations, the complaint would not have stated a good cause of action. If Benjamin Marshall had declared orally in so many words what he has thus expressed in writing, I think no one would have supposed that he rendered himself liable to an action.

We ought not, I think, to extend the application of section 162 beyond the probable intent of the legislature, or to give a

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party the benefit of a cause of action by this indirect mode of 12
averment, when he would not have had it, if he had put his alle-
gations in proper form, and in express terms. Some rules of
pleading, in the confusion and anarchy introduced by the Code,
must still be observed and one of them is or ought to be, that
where a consideration is not implied, or a request is "essential
to the defendant's liability, it is the gist of the action and must
be specially averred." (Gould's Pleadings, 176.)

The case of *Prindle v. Carruthers* (15 N. Y., 425), is not in
conflict with the views here expressed. There the consideration 13
"for value received" appeared from the face of the instrument,
and was moreover held to have been argumentatively inferable
from the extrinsic allegation that the defendant made his con-
tract in writing. (14 *Id.*, 431.)

It is suggested that the rule, that where a contract is susceptible
of a two-fold construction, one of which will make it valid and
the other void, the legal presumption is in favor of the validity
of the contract, may help the plaintiff in this case. The rule
turns rather upon a question of evidence or presumption, than of
pleading. If the question here turned upon the nature of the 14
services rendered the rule would apply. But it turns upon the
question for whom or at whose request were the services rendered,
and the absence of any allegation on this point was never, that I
am aware of, supposed to be aided or cured by this rule.

It is further suggested that the rule of construing a pleading
under the Code contrary to what it was before, is to construe it
most favorably to the pleader. I do not admit the existence of
the rule to this unqualified extent. It may be admissible on
questions of form, but it can not be applicable in regard to the 15
fundamental requisites of a cause of action.

The order of the Special Term should be reversed with costs,
and judgment rendered in favor of the defendants on the de-
murrer, with leave to the plaintiff to amend her complaint on
payment of costs.

GOULD, P. J., concurred.

PECKHAM, J., dissented.

Carnwright v. Gray, 127 N. Y., 92.

CARNWRIGHT v. GRAY.

New York Court of Appeals, 1891.

[Reported in 127 N. Y., 92.]

1. A promissory note must contain the positive engagement of the maker to pay at a certain definite time, and the agreement to pay must not depend on any contingency, but be absolute and at all events.
2. The fact that an instrument is made payable at a specified time after the death of the maker does not prevent its being a valid promissory note.
3. It is not necessary under the N. Y. Statute (1 R. S. 768), in actions upon promissory notes, either to aver or prove consideration; the rule applies whether the note is negotiable or not, and whether it expresses value received or not.

1 Action against defendants as executors.

2 The complaint alleged: That Samuel P. Freligh, on the 2d day of September, 1871, became and was indebted to plaintiff in the sum of fifteen hundred dollars for moneys lent by plaintiff to said Freligh, and that on said 2d day of September, 1871, to secure the payment of said sums and as evidence of said indebtedness and in consideration thereof, the said Samuel P. Freligh, at ———, on said 2d day of September, 1871, made, executed and delivered to plaintiff his certain promissory note or obligation in writing, of which the following is a copy, viz.:

“QUARRYVILLE, September 2d, 1871.

Thirty days after death I promise to pay to Cornelius W. Carnwright fifteen hundred dollars with interest.

SAMUEL P. FRELIGH.”

3 That plaintiff is still the holder and owner of said promissory note or written obligation, and that no part thereof, or of the said money consideration has been paid, and that the said sum of fifteen hundred dollars, with interest, from September 2d, 1871, is due and owing to the plaintiff therefor and thereon.

The complaint then showed the death of said Freligh, defendants' qualification as his executors, plaintiff's demand upon them for the payment of the note after the same became due and payable and their refusal so to do.

For a second cause of action the complaint alleged the making

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and delivery to plaintiff "for value received" of a similar note 4
by the deceased, wherein "for value received" the said Freligh
"for value received" promised to pay, etc.

Judgment was demanded for fifteen hundred dollars and
interest.

The defendants denied the making of the note, alleged that if
ever made it was made without consideration, and therefore,
void, and that if ever made, it was paid during the lifetime of
said Freligh.

The plaintiff produced witnesses who testified to the genuine- 5
ness of the deceased's signature, and put the note in evidence.
He then rested. The court denied defendants' motion for a non-
suit, made upon the ground that plaintiff had failed to establish
a valid contract against the estate, and had not proved that the
instrument introduced in evidence had any consideration.

At Circuit plaintiff had a verdict.

The General Term of the Supreme Court affirmed the judg- 6
ment, on grounds similar to those presented in the following
opinion of the Court of Appeals.

The Court of Appeals affirmed the judgment. BROWN, J.
When the plaintiff rested his case, and again, at the close of the
testimony, the defendant moved to dismiss the complaint upon
the ground that no proof had been given that the instrument
sued upon had any consideration. These motions were denied
and the court instructed the jury that the instrument was a
promissory note and imported a consideration, and that the
burden rested upon the defendants to show that it was without 7
consideration.

The exceptions to these rulings present the principal question
argued upon this appeal.

The statute of this state in reference to promissory notes pro-
vides as follows (1 R. S., 768):

"Sec. 1. All notes in writing, made and signed by any person,
whereby he shall promise to pay to any other person or his order,
or to the order of any other person, or unto the bearer, any sum

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8 of money therein mentioned, shall be due and payable as therein expressed; and shall have the same effect and be negotiable in like manner as inland bills of exchange, according to the custom of merchants.

"Sec. 4. The payees and indorsees of every such note payable to them or their order and the holders of every such note payable to bearer, may maintain actions for the sums of money therein mentioned, against the makers and indorsers of the same, respectively, in like manner as in cases of inland bills of exchange and not otherwise."

9 Our statute is a substantial re-enactment of the statute of Anne (3 and 4 Anne, c. 9), which provided that: "All notes signed by a person promising to pay to another his, her or their order or to bearer" should be construed to be by virtue thereof due and payable to any such person to whom the same is made payable, etc., etc.

This statute was held by the courts of England to include within its terms a non-negotiable note (*Smith v. Kendall*, 6 D. & E., 123; *Burchell v. Slocock*, 2 Ld. Raym., 1545; 3 Kent's 10 Com., 77).

In the case first cited Lord Kenyon said: "A note may be made payable to 'A' or bearer, 'A' or order, or to 'A' only." Similar decisions were made by the courts of this state under our own statute (*Downing v. Backenstoos*, 3 Caines, 137; *President v. Hurtin*, 9 Johns, 217; *Kimball v. Huntington*, 10 Wend., 675; *Hall v. Farmer*, 5 Denio, 484).

In *Downing v. Backenstoos*, a non-negotiable note was declared on as within the statute, and the defendant demurred on the ground that the declaration did not allege the transaction 11 and consideration upon which the note was given. The court gave judgment for the plaintiff saying: "The very point was settled in *Green v. Long* (April Term, 1798) in conformity to the adjudications in Westminster Hall."

In *President v. Hurtin* it was said: "The note set forth is a good promissory note within the statute, though it has no words bearer or order. This is the established English law and the same rule is recognized by this court."

In *Kimball v. Huntington* the action was upon a due bill in

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this form: "Due Kimball and Kenston, three hundred and 12
twenty-five dollars payable on demand." Judge Nelson said:
"The instrument is a promissory note within the statute.
Neither the acknowledgment of value received or negotiable
words are essential to bring it within the statute." (See also
Carver v. Hayes, 47 Me., 257; *Franklin v. March*, 6 N. H., 364.)

No authority is cited in the courts of this state or of England
holding that a non-negotiable note is not within the terms of the
law cited, and we are of the opinion that the language of our
statute includes a note payable to a person without words of
negotiability. 13

The instrument sued upon being, therefore, a promissory note
within the statute of this state, it follows that it imports a con-
sideration. By the express terms of the statute the sum of
money therein mentioned is declared to be "due and payable as
therein expressed." That it is "due and payable" according to
its terms is the legal conclusion which the court must draw from
the instrument itself. A valid contract is thus declared to exist,
and of course a consideration must be implied. Hence "value
received" need not appear on the face of the note, as those 14
words express only what the law implies. (*Hatch v. Traves*, 11
Ad. & El., 702; *Hall v. Farmer*, 5 Denio, 484.) The effect of
laws which make promissory notes negotiable, or which author-
ize actions of debt upon them, though non-negotiable, is to take
them out of the common law rule which requires that every
contract must be shown by the party who sues upon it, to be
supported by a consideration, and enables the holder to maintain
an action thereon without alleging or proving a consideration.
In other words a consideration is implied from the character of
the instrument (*Peasley v. Boatwright*, 2 Leigh, 195; *Hatch v.* 15
Traves, supra).

The English statute was enacted to settle the controversy that
prevailed, whether under the customs of merchants promissory
notes were negotiable.

They were thereby declared to be assignable or indorsable
over in the same manner as inland bills of exchange were, accord-
ing to the customs of merchants, and holders were empowered
to maintain actions thereon in the same manner as they might

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- 16 do upon any inland bill of exchange made or drawn according to the custom of merchants.

Our statute contains similar provisions. Promissory notes and inland bills of exchange were, by virtue of these laws, put upon an equality. They were made negotiable if they contained words of negotiability, but whether negotiable or not, and whether they expressed value received or not, it was no longer necessary in actions thereon to aver and prove consideration.

- Such was and is the rule as to inland bills of exchange. (1 Daniel on Negotiable Inst., § 161; Raubitschek v. Blank, 80 N. Y., 479; Averett's Admrs. v. Booker, 15 Gratt., 163; Wells v. Brigham, 6 Cush., 6.)

And the same rule under the statute was made applicable to promissory notes. (Townsend v. Derby, 3 Metcalf, 363; Dean v. Carruth, 108 Mass., 242; Bank of Troy v. Topping, 9 Wend., 277; 13 *id.*, 557; Chitty on Bills [9th Am. Ed.], 78-181; Paine v. Nalke, 57 How. Pr., 273; Story on Promissory Notes, § 51; 3 Kent's Com., 77, 78; 1 Parsons on Conts. [6th ed., 249]; 1 Parsons on Bills, 193.)

- 18 The statute does not require a note to express value received upon its face, and no definition of such an instrument requires the expression of that fact.

The note sued upon, although by its terms payable after the death of the maker, was a valid instrument.

A promissory note is defined to be a written engagement by one person to pay absolutely and unconditionally to another person therein named, or to the bearer, a certain sum of money at a specified time or on demand. (Story on Prom. Notes, § 1; Coolidge v. Ruggles, 15 Mass., 387.)

- 19 It must contain the positive engagement of the maker to pay at a certain definite time and the agreement to pay must not depend upon any contingency, but be absolute and at all events.

Tried by this standard the instrument set out in the complaint was a valid promissory note. The fact that it was payable after the death of the maker did not affect its character. (3 Kent's Com., 76.)

It follows from these views that the motion to dismiss the complaint was properly denied, and there was no error in the

charge of the court. The point made by the appellant that the court erred in its charge as to the burden of proof on the question of consideration, assuming the evidence *pro* and *con* upon that question was given, was not raised at the trial. The proposition made by the defendant at the close of the judge's charge, and the only one to which an exception appears in the record, was as follows:

"In order that there may be no doubt about our position we ask the court to charge the jury that there has been no evidence given of consideration, and to direct a verdict for the defendant upon that ground." 21

The defendant having thus squarely planted himself on the ground that there was no evidence of consideration, and asked the court to direct a verdict in his favor, cannot now claim that there was evidence for the jury and that he was entitled to a different instruction from that given. The defendant's claim all through the trial was that the note did not import a consideration, and that the plaintiff could not recover without proof of that fact, and his motion to dismiss the complaint and direct a verdict in his favor, and his exceptions to the charge, all sharply present that question; but he nowhere claimed that he had given evi- 22
dence which, if believed by the jury, overcame the presumption arising in favor of the note.

This clearly appears from the statement I have quoted.

The exceptions to the admission of evidence present no error and the judgment should be affirmed.

All the judges concurred, except FOLLETT, CH. J., and VANN, J., dissenting, and PARKER, J., not voting.

Judgment affirmed.

Keteltas v. Myers, 19 N. Y., 231.

KETELTAS v. MYERS.

New York Court of Appeals, 1869.

[Reported in 19 N. Y., 231, rev'g 3 E. D. Smith, 83.]

1. The complaint alleged that defendant, on a day specified, for value received, made and delivered to plaintiff, his promissory note in writing, and payable to plaintiff's order, and indorsed by him [*setting forth a copy*]; that there was due and owing plaintiff the said sum of [*specifying it*], with interest thereon from [*specifying date*]. *Held*, sufficient; and that a demurrer on the ground that it was not stated that plaintiff was owner of the note, or that there had been a breach, or that anything was due or owing *upon it*, or *from defendant* was frivolous.
2. "Due" is sometimes used to express the mere state of indebtedment, and then, is an equivalent to owed or owing; sometimes to express the fact that the debt has become payable.

1 Action on a promissory note.

The allegations of the complaint were as follows:

"1st. That the defendant, on the first day of July, 1853, for value received, made and delivered to the said plaintiff his promissory note in writing, and payable to the order of the plaintiff, and indorsed by him, of which the following is a copy:

NEW YORK, July 1st, 1853.

- 2 "Sixty days after date, I promise to pay to the order of Eugene Keteltas, two hundred and four 67-100 dollars, for value received.

JAMES MYERS, JR.

\$204.67.

661 Water street."

That there is due and owing the said plaintiff the said sum of two hundred and four 67-100 dollars, with interest thereon from the second day of September, one thousand eight hundred and fifty-three.

- 3 WHEREFORE the plaintiff demands judgment against the said defendant for the said sum of two hundred and four 67-100 dollars, with interest from the 2d day of September, 1853."

The *Code of Procedure* then in force provided:

§166 [2]. In an action or defense founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due

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to him thereon from the adverse party a specified sum, which he 4
claims.

Section 534 of the *Code of Civil Procedure*, by which the
above provision is superseded, is as follows :

§ 534. Where a cause of action, defence, or counterclaim, is
founded upon an instrument for the payment of money only, the
party may set forth a copy of the instrument, and state that there
is due to him thereon, from the adverse party, a specified sum,
which he claims. Such an allegation is equivalent to setting
forth the instrument, according to its legal effect.*

The Court of Common Pleas at Special Term sustained a
demurrer to the complaint on the ground of insufficiency.

The court held that plaintiff's title was sufficiently shown
because there was no averment of a *transfer* of the note by
indorsement; the mere statement that plaintiff indorsed the note
without alleging a delivery amounted to nothing.

But there was no averment of a *breach*; nor "that the sum
was due and owing *from the defendant*."

The General Term affirmed the judgment, on the same grounds. 6

The Court of Appeals reversed the judgment.

ALLEN, J. There are four grounds of objection specified in
the demurrer. The first is that it does not appear, and is not
stated or averred, that the plaintiff is the owner or holder of the
note in the complaint mentioned. The allegation is, that the
defendant, on the 1st day of July, 1853, for value received, made
and delivered to the plaintiff his promissory note, etc. The alle-
gation that the note was made to the plaintiff would have been a
sufficient averment of ownership, without averring a delivery. 7
(7 Term R., 596; 5 East, 476; 10 How., 275; 12 *id.*, 452.) But
it is unnecessary to dwell on this point, as the court below held it
not well taken, and it was not insisted upon, but rather aban-
doned, on the argument here.

The second ground of demurrer is, "that it does not appear,
and is not stated or averred, that the same or *any part thereof*

*The section is merely permissive, and the pleader is not confined to
this mode of pleading. *Mayor, etc., v. Doody*, 4 Abb. Pr., 127.

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8 *remains unpaid;*” and the third ground is, “that it is not stated that any sum is due or owing *upon it*.”

The making and delivery of the note to the plaintiff is averred, and after setting out a copy of it, by which it appears it was dated on the 1st day of July, 1853, and was payable to the order of the plaintiff at sixty days, and was for the sum of \$204.67, the complaint further avers “that there is due and owing said plaintiff, the *said sum* of \$204.67, with interest thereon from 2d of day September, 1853.” The amount averred to be due is the exact sum mentioned in the note, and the claim of interest is from the
9 2d day of September, 1853, the day the note became due, at which time, and not before, interest was chargeable. The words “*said sum*” referred most clearly to the note and the money mentioned in it, and are equivalent to averring that there was due upon it, or thereon, the sum mentioned in it, with interest. The defendant promised to pay the plaintiff a certain sum. The note is evidence of that sum, and a true copy is set out. If the note, or any part, had been paid, that was matter of defence to be set up in the answer. It was outstanding, as the complaint shows,
10 and that imputes a subsisting liability. (Story on Prom. Notes, § 106; *Lake v. Tyson*, 6 N. Y., 2 Seld. 461.) The case of *Allen v. Patterson*, 7 N. Y. (3 Seld., 476), settles the present in favor of the defendant and that very sum is alleged to be due to the plaintiff.

The court below, in coming to the conclusion that there was no sufficient breach stated in the complaint, remarked that there is no allegation that the note has become payable, or that it is due. But the learned judge, who wrote so elaborately on that point, seemed to have overlooked the fact that a copy of the
11 note was set out in the complaint under Section 162 of the Code, in which it appeared that it was dated 1st of July, 1853, and was payable sixty days after date, to the order of the plaintiff, showing upon its face that it had become payable, and was due before the commencement of the action. All that was necessary to state additionally was, that there was due to the plaintiff thereon, from the defendant, the amount of the note. This is done, in the present case, in equivalent words, about which there can be no mistake or misleading of the party; and the allegations

Palmer v. Smedley, 6 Abb. Pr. R., 205.

should have been liberally construed, with a view to substantial 12
justice between the parties. (Code, § 159 ; 7 N. Y., 480.)

The court below admitted that the objections to the complaint
were strictly technical, and that under the present system of
pleading, such technicality should not be encouraged further
than is necessary for the due and orderly administration of justice.
In our opinion, they should have decided in conformity to those
views. They should have gone further—they should have
declared the demurrer frivolous, as we now do. 13

The judgment must be reversed, and judgment rendered for
the plaintiff with costs.

All the judges concurred.

Ordered accordingly.

PALMER v. SMEDLEY.

New York Supreme Court, Special Term, 1858.

[Reported in 6 Abb. Pr. R., 205 ; aff'd without opin., 28 Barb., 468.]

1. Complaint held bad on demurrer which—after setting out the note in
suit and alleging its assignment to plaintiff—alleged that the note
was the property of the assignor, who was the lawful owner and
holder thereof.
2. The presumption of law which would arise from the allegation of
plaintiff's possession of the note is rebutted by the averment that the
assignor is the lawful owner and holder.

The complaint alleged an assignment by an association known 1
as Antioch College of its estate, etc., to plaintiff in trust to col-
lect its debts. It then averred that on April 5, 1851, the de-
fendant made his promissory note for the sum of \$100, payable
September 1, 1852, and delivered the same to the said Antioch
College ; that the note had never been paid ; that it was then in
the possession of the plaintiff *as the property* of the said Antioch
College, *which was the lawful owner and holder thereof* ; and
that there was due on said note \$135.53. 2

A second cause of action alleged defendant's subscription to
the stock of the college in a specified sum, which had never
been paid, and that there remained due and owing to said col-
lege the amount of said subscription.

Cohu v. Husson, 118 N. Y., 662; aff'g 14 Daly, 200.

- 3' Plaintiff demanded judgment for both sums. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

DAVIES, J. As to the first cause of action, it is clearly defective. It not only does not aver that the plaintiff is the real party in interest, but avers that the note sued on is not the property of the plaintiff and that he is not the lawful owner and holder of the same, but that it is the property of another, and which other is the lawful owner and holder thereof. This is in direct conflict with section 111 of the Code. [Code Civ. Pro., § 449.]

4 The presumptions of law which would arise from the fact that the plaintiff, being in possession of the note, is the lawful owner and holder thereof, is rebutted by the averment that he is not such lawful owner and holder.

In reference to the second cause of action, there is no averment of any indebtedness to the plaintiff by reason of the matters therein stated, or of any right therein on his part to demand of the defendant the money therein mentioned. The averment is, that the amount of the subscription is now due and owing to the said college, thus negating any indebtedness to the plaintiff.

COHU v. HUSSON.

New York Court of Appeals, 1889.

[Reported in 118 N. Y., 662; aff'g 14 Daly, 200.]

1. The omission in a complaint on a promissory note setting forth the note and alleging that plaintiffs were the owners thereof, in the short form given by Code Civ. Pro., § 534, to allege also, as required by that section, that it was executed by defendant, or that a specified sum was due plaintiff thereon, is cured by an answer expressly admitting defendant's execution of the note, not alleging payment, but setting up as a defense, want of consideration.
2. After judgment in favor of plaintiff, the complaint might be deemed amended.
3. A complaint in an action by administrators alleged that letters of administration were duly issued and granted to plaintiffs by the surrogate of a specified county, and that they duly qualified, etc.—*Held*, sufficient as against an objection taken at the trial, although it did not set forth the facts showing that the surrogate had jurisdiction.

Action on a promissory note.

Cohu v. Husson, 118 N. Y., 602; aff'g 14 Daly, 200.

The allegations of the complaint, were as follows : 1

I.—That the plaintiffs are lawful owners and holders of a certain promissory note of which the following is a copy :

\$750.00.

NEW YORK, Decr. 11th, 1878.

"Five months after date I promise to pay to the order of Mr. Henry S. Cohu, seven hundred and fifty dollars at the Brooklyn Bank, in the City of Brooklyn, value received.

"NEW YORK, 11/14, '79.

JOSEPH HUSSON."

II.—That thereafter and before the commencement of this action said Henry S. Cohu died intestate, and that on the 11th day of May, 1883, letters of administration upon the estate of said Henry S. Cohu, deceased, were duly issued and granted to these plaintiffs by the surrogate of the city and county of New York, appointing the plaintiffs administrators to all the goods and chattels and credits which were of said deceased, and that the plaintiffs thereupon duly qualified as such administrators, and entered upon the discharge of the duties of their said office. 2

III.—That no part of said note has ever been paid.

WHEREFORE, etc.

The answer, omitting formal parts, was as follows : 3

I.—That the note in suit had no legal inception, because, that for their mutual accommodation, the plaintiffs' intestate, on or about the 4th day of December, 1878, exchanged promissory notes with the defendant for the sum of seven hundred and fifty dollars, under the agreement that the said plaintiffs' intestate should pay the promissory note he gave this defendant, and this defendant should pay the promissory note which he gave the said plaintiffs' intestate, which is the note in suit, and neither was to have any validity as against the other, unless so respectively paid ; that this defendant used the said plaintiffs' intestate's note, which is of the same amount, date and time of payment as the note in suit, and transferred the same to George B. Ripley & Co. with this defendant's endorsement thereon. That, at the maturity of the last mentioned note, the said plaintiffs' intestate did not pay the same, but the same was protested for non-payment, and this defendant was duly notified, as indorser thereon, by the said George B. Ripley & Co., who, 4

Cohu v. Husson, 113 N. Y., 662; aff'g 14 Daly, 200.

5 up to the commencement of this suit were, and had been, and are holders thereof, and claim to enforce the same against this defendant, whereby the consideration of the promissory note, now in suit in this action, before the death of the said intestate, and ever since, has wholly failed, and the said plaintiffs' intestate was not, up to the time of his death, nor the said plaintiffs, as his legal representatives, been bona-fide holders thereof for value, or compelled to pay the same.*

6 II.—For a second and further defense, and by way of counterclaim, this defendant says, that, on the 11th day of August, 1879, the said intestate made his certain promissory note, of which the following is a copy :

NEW YORK, August 11th, 1879.

Two months after date I promise to pay to the order of Joseph Husson, seven hundred and fifty dollars, at—value received.

HENRY S. COHU.

7 That he delivered the same for value to this defendant, who ever since has been the lawful owner and holder thereof; that, at maturity, and before his death, the said intestate did not pay the same, and the amount thereof is now due this defendant, with interest thereon, from the time of its maturity, and he claims to offset the same against any demand the said plaintiff may sustain against this defendant, on the cause of action herein, and to have judgment against the said plaintiffs, as administrators, etc., of the said intestate, for the said amount with the lawful interest thereon.

8 Wherefore, this defendant prays that the said complaint may be dismissed with costs, and that he may have judgment on this counterclaim, herein, with costs.

Defendant raised the objection that the complaint neither pleaded the note according to common-law rules nor complied with the conditions of the short method of pleading on instruments for the payment of money only given by Code Civ. Pro. § 534, which is as follows: "Where a cause of action, defense, or counterclaim, is founded upon an instrument, for the payment of money only, the party may set forth a copy of the

* That this portion of the answer presents no legal defense, see *Rice v. Grange*, 131 N., Y. 149.

Cohu v. Husson, 113 N. Y., 662; aff'g 14 Daly, 200.

instrument, and state that there is due to him thereon, from the adverse party, a specified sum, which he claims. 9

Such an allegation is equivalent to setting forth the instrument according to its legal effect."

The Court of Common Pleas at the Trial Term, upon the verdict of a jury, entered judgment for the plaintiff.

The General Term affirmed the judgment, making no ruling however on the question of pleading.

The Court of Appeals, affirmed the judgment.

EARL, J. [*after stating the substance of the pleading said*]: "It is true that the complaint is not in compliance with section 534 of the Code, as it does not state that there is due to the plaintiffs on the note from the defendant a specified sum which they claim. They simply allege that they are lawful owners and holders of the note, and set it out. They do not allege that it was executed by the defendant, nor do they allege that any sum whatever is due thereon to them. But this defect in the complaint is cured by the answer, in which the execution of the note by the defendant is admitted. And there is no allegation 10 that it has been paid. Therefore, even if the complaint would have been held defective, if demurred to, the defect was cured by the answer, and the complaint may now be deemed amended. (Code, §§ 721-723; *Bate v. Graham*, 11 N. Y., 237; *Pratt v. H. R. R. Co.*, 21 *id.*, 305; *Haddow v. Lundy*, 59 *id.*, 328.) 11

"It was also claimed that the complaint was defective because it did not allege facts showing that the surrogate of New York County, by whom plaintiffs were appointed administrators, had jurisdiction to appoint them. But the allegation in the complaint is that the letters of administration were duly issued and 12 granted to the plaintiffs by the surrogate appointing them administrators of all the goods, chattels and credits of the deceased, and that they duly qualified as such, and entered upon the duties of their office. These allegations must be held sufficient as against an extremely technical objection taken for the first time at the trial " [*Ruling as to insufficiency of evidence, omitted here.*]

All the judges concurred.

Judgment affirmed.

Conkling v. Gandall, 1 Abb. Ct. of App. Dec., 423.

CONKLING v. GANDALL.

New York Court of Appeals, 1864.

[Reported in 1 Abb. Ct. of App. Dec., 423.]

In an action against an indorser of negotiable paper, the complaint must state the facts necessary to charge him as such; and an averment of demand and notice is not dispensed with by giving a copy of the instrument and alleging the sum due, in the short form allowed by Section 162 of the Code of Procedure [*Code Civ. Pro.*, § 534] for pleading instruments for the payment of money only.*

- 1 Jonas and Theodore Conkling sued James R. Gandall, as indorser, and George L. Burdick and Charles Finn, as makers of a note. The allegations of the complaint were as follows:

"That the defendants, Burdick and Finn, made their certain co-partnership promissory note in the words and figures following, that is to say: [*Copy of Note made by Burdick and Finn to the order of Gandall.*]

"That the said note was indorsed as follows:

"'J. R. Gandall, Salem, Washington Co., N. Y.'

- 2 "That such indorsement was so made by the above named defendant, James R. Gandall.

"That the said plaintiffs are now the owners and holders of the said promissory note, and that the whole amount thereof, with interest, is due from the said defendants thereupon. Wherefore, etc."

Gandall, who alone appeared, demurred on the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action, in that it did not aver presentment of said note for payment, demand or refusal, or protest, or notice to defendant Gandall.

- 3

The Special Term overruled the demurrer.

The General Term affirmed the judgment.

The Court of Appeals reversed the judgment.

WRIGHT, J. This judgment; I think, cannot be sustained. A

* This overrules in effect, *Roberts v. Morrison*, 11 N. Y. Leg. Obs. 60, and sustains *Alder v. Bloomingdale*, 1 Duer. 601; s. c. 10 N. Y. Leg. Obs., 363; *Cottrell v. Conklin*, 4 Duer., 45; *Marshall v. Rockwood*, 12 How. Pr., 452; *Lord v. Cheesbrough*, 4 Sandf. 696.

complaint, under the Code, must contain "a plain and concise statement of the facts constituting a cause of action" (Code of Pro., § 142), and it may be demurred to if it does not (§ 144). No cause of action was stated against the defendant Gandall. The only allegation affecting him is, that he indorsed a promissory note for two hundred and fifty-six dollars and fifty-eight cents, made by the firm of Burdick & Finn, payable to his order at the bank of Fort Edward, four months after date, which the plaintiffs own and hold. This is not stating a cause of action against an indorser. The mere fact of indorsement of a negotiable promissory note gives no right of action, nor entitles the holder to recover against the indorser. Without resorting to the contract of the indorser, which the law implies, the indorsement of such a note is nothing but an order upon the maker to pay its contents to the lawful holder. Such a note, although indorsed, contains no promise to pay on the part of the person indorsing it. His contract is conditional, not absolute, and depends on facts outside of the written instrument. He promises to pay only on condition that the holder shall present the note for payment, and, if payment is refused, notice shall be given to him at the time and in the manner required by law. This demand of payment and notice of dishonor, or facts by which they are excused, must be proved on the trial, to establish his liability, and facts thus necessary to be proved, as they constitute in part the cause of action, must be averred in the complaint.

The complaint, therefore, as against the appellant Gandall, was insufficient and bad on demurrer, unless the requirements of section 142 are dispensed with by another section of the Code of Procedure.

It is provided in section 162, chapter 5, of the Code, entitled "General rules of pleading" [*re-enacted in substance in Code Civ. Pro., § 534*], that "in an action or defense, founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party, a specified sum which he claims." The precise intention of the legislature, or the framers of the Code, in this provision, is not clear, but certainly it was not meant that a complaint should be good, that

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- 8 merely set forth a copy of the instrument, with a statement that there was due to the plaintiff thereon, from the person named as a defendant, a specific sum, without averring that the defendant executed or delivered the instrument, or that it belonged to the plaintiff, or in any way averring the defendant's liability or the plaintiff's title. Such a mode of pleading would be so loose, vague and indefinite, that it is not to be assumed that the legislature intended to sanction it. This, however, would follow if the clause is not to be read in connection with section 142, but construed alone and *strictly*. How are issues to be framed under
- 9 such a complaint, or one dispensing with the requirements of section 142? Take the present case. The instrument is a promissory note; three parties are impleaded as defendants; a copy of the instrument is given, accompanied by a statement that there is due thereon, from the persons named as defendants, a specified sum which the plaintiff claims, and there is nothing more. The defendants may interpose by answer a denial, but what issue or issues will be thereby framed? There is but a single fact alleged, and that in the most general form, upon
- 10 which an issue can be taken; viz., that there is due from the defendants to the plaintiffs, upon the instrument, the sum named. Would denying this put in issue the making of the note by Burdick & Finn as copartners, and the plaintiff's title to it? Manifestly not. Nor did the pleader in this case so understand it. It is averred that Burdick & Finn made the notes as copartners, a copy of which is set out; that the defendant Gandall indorsed it, and that the plaintiffs are the owners and holders; all of which was unnecessary if the provisions of section 142 are
- 11 dispensed with by section 162, where the "action is founded upon an instrument for the payment of money only." Although the intended purpose of the last clause of section 162 is not clear, I am inclined to the opinion that it was meant that where the action or defence was founded upon an instrument for the payment of money only, instead of setting forth the instrument according to its legal effect in the body of the complaint or answer, it should be sufficient for the party to give a copy of it. Be this, however, as it may, it is too improbable to suppose that it was intended, in any class of actions, that a complaint should

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be good, that did not, upon its face—either by direct averment, 12 or by giving a copy of the instrument upon which the action was founded, with allegations connecting the parties with it—show a cause of action; or which did not contain material allegations to that end, on which issue might be taken, or on which, if issue was not taken, judgment would legally pass against the impleaded parties by default. In this case the instrument (a copy of which is given) purports to be for the payment of money; but without the averment that it was made by Burdick & Finn, named as defendants, as copartners, and unless plaintiffs' title to it appears in some way (neither of which facts is to be implied 13 from the instrument itself) there would be no statement of a cause of action by the plaintiff against them. There is certainly no cause of action shown, where the facts upon which a plaintiff grounds his right to recover against a party, whom he may choose to implead as a defendant, do not affirmatively, or by implication, appear upon the face of the pleadings.

Beyond question, the complaint we are considering was sufficient against the defendants, Burdick & Finn. Their liability and the plaintiffs' title appear affirmatively or by implication in 14 the pleading. It is alleged that as copartners they made a certain promissory note, of which a copy is given, instead of stating the legal effect of the instrument; and that the plaintiffs are the owners and holders thereof, and that the whole amount is due. Nothing more was required. The instrument itself declares the liability of its makers. It contains an absolute promise of the makers to pay a sum of money to its lawful holder at the time specified. There are no conditions to the promise. The instrument is evidence of the amount of the debt, and the effluxion of time by its terms fixes their liability. If the plaintiffs have title 15 to the note at its maturity, they are the parties to whom the obligation of absolute payment is due. By proof on the trial of the making of the note by the firm, and the plaintiff's title to it, their right to recover as against the makers is established. But it is not so as against the defendant Gandall. Alleging and proving simply that he indorsed a note payable to his order would create no liability on his part to the holder. The law implies no contract to pay absolutely from the mere indorsement of

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16 a negotiable promissory note. Gandall's indorsement is averred in this complaint, and nothing more affecting him. If this fact had been put in issue and proved on the trial, the plaintiffs would not have been entitled to recover against him. His promise is conditional, and his liability depends upon facts outside of the instrument on which his indorsement is made. An action as against him is founded on something more than an instrument for the payment of money only, even though it should be considered that section 162 of the Code would embrace the case of the makers of a promissory note, whose promise is contained in the contract evidenced by the instrument itself. Payment of the note must be first properly demanded of the makers, and due notice given to the indorser before any legal liability attaches to the latter. A complaint that does not aver facts, entitling the plaintiff to recover against a party, which do not appear in the instrument set forth, nor are to be implied therefrom, must be defective. If it be necessary as against an indorser (which it unquestionably is) to establish his liability, to prove a demand of payment and notice of dishonor of the note, 18 it is incumbent upon the pleader to state these facts, otherwise the cause of action is defectively stated.

Whatever, therefore, may have been the legislative purpose in the enactment of section 162, it was not intended to include the case of a party whose liability was not absolutely fixed by and expressed in the instrument, but depended for its ever attaching on conditions precedent. Nor do I think in any case, even in that of the makers of a promissory note, the effect of the section is to dispense with the requirements of section 142. A complaint that did not aver the making of a promissory note, of 19 which a copy was given, by the persons sought to be charged as makers, nor show that the plaintiff was the owner and holder, would in my judgment be bad on demurrer. If this were not so, the system of pleading inaugurated by this Code would be immeasurably more vague and indefinite than that which it assumed to supplant.

The judgment should be reversed.

A majority of the judges concurred for reversal.

Chemical National Bank v. Carpentier, 9 Abb. N. C., 301.

INGRAHAM, J., delivered a dissenting opinion, relying on 20 *Keteltas v. Myers*, 19 N. Y., 231 ; and *Prindle v. Carruthers*, 15 *id.*, 425, as sustaining the complaint.

Judgment reversed.

CHEMICAL NATIONAL BANK v. CARPENTIER.

New York Supreme Court, Special Term, 1881.

[Reported in 9 Abb. N. C., 301.]

1. An averment in a complaint that a note, at the instance of the holder "was duly presented for payment, and payment thereof demanded and refused," is sufficient to charge an indorser, although it does not allege the place where the note was payable.
2. The demurrer to the complaint held, on a motion to strike it out, not to be absolutely frivolous, although not deemed such that it ought to be sustained after argument.

Motion to strike out demurrer to complaint as frivolous.

Action against the maker and indorser of a promissory note. The defendant, Carpentier, the last indorser, demurred on the ground of insufficiency, and argued that it was not alleged in the complaint that the plaintiff gave any consideration for the note ; and that it was not alleged that when the note became due plaintiff presented the same for payment to, or demanded payment thereof from the maker or any person or corporation authorized to pay the same.

BARRETT, J. The only ground of demurrer which seems to amount to anything here is that which attacks the averment as to presentation.

The complaint charges due presentment, but not due presentment to the maker nor at the place where the note was payable according to its tenor. There is a conflict of authority upon this point. Several cases hold it to be necessary to aver presentment to the maker or at the place of payment (*Spellman v. Weider*, 5 How. Pr., 5 ; *Price v. McClare*, 6 Duer, 544 ; affirming 3 Abb. Pr., 254) ; others hold an allegation of due presentment to be sufficient within the provision of the Code as to the manner of pleading conditions precedent (*Adams v. Sherrill*, 14 How. Pr., 297 ; *Woodbury v. Sackrider*, 2 Abb. Pr., 405). The latter I think

Cook v. Warren, 88 N. Y., 37.

- 4 the better view, and if I were hearing the demurrer as an issue of law, my impression is that I should so hold. But I am clearly of opinion that the demurrer is not absolutely frivolous, and consequently that the present motion should be denied with \$10 costs to abide the event.

Again trial of demurrer at Special Term.

- 5 VAN VORST, J. [*after reiterating the rule that the original consideration expressed in the note is enough to entitle the plaintiff as the owner to recover upon it*]: In regard to the second ground of demurrer there is an apparent conflict of authority. But I agree with Justice Barrett in the opinion expressed by him when this case was before him at chambers, that the averment in the complaint that the note, at the instance of the holder, "was duly presented for payment, and payment thereof demanded and refused," was sufficient.

- 6 I think that such statement in the complaint is a sufficient averment of the performance of the condition precedent necessary to charge an indorser under the provisions of the Code. (Code, §. 533; *Femer v. Williams*, 37 Barb., 9; s. c., 14 Abb. Pr., 215; *Adams v. Sherrill*, 14 How. Pr., 297.)

There should be judgment for the plaintiff on the demurrer.

COOK v. WARREN.

New York Court of Appeals, 1882.

[Reported in 88 N. Y., 37.]

1. A demurrer is not frivolous if any argument is needed to sustain it.*
2. A complaint in an action on a promissory note against the maker, H, and indorsers, W and Y, which, after averring the making, indorsement and delivery, due presentation for payment, and demand and refusal thereof, adds,—whereupon it was "duly protested for non-payment; of all of which the said H had due notice," states no cause of action against the indorsers, as there is no allegation of notice to them; the averment of due protest of a note is not equivalent to an allegation of notice.
3. Where a word used in pleading has different meanings, one the result of judicial or statutory definition, and the other founded simply upon

* And see *Chemical Nat. Bank v. Carpentier*, *ante* p. 78.

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an inaccurate popular use, the latter can only be adopted in construing the pleading if it plainly appears from other averments or the whole tenor of the paper that such was the sense in which it was employed.

Action on a promissory note.

1

The allegations of the complaint were:

"That the defendant, Thomas D. Hammond, on the 8th day of December, in the year 1877, at Mayville, N. Y., made his promissory note in writing, dated that day, whereby, by the name of T. D. Hammond, six months after date, for value received, he promised to pay to W. P. Whiteside, or order, six hundred dollars at the banking office of Gifford & Co., with interest, and that the same was duly indorsed by the said defendants, Whiteside and Warren, and that said Hammond then and there delivered the same to the said plaintiff.

2

"That when the said note became due, the same was duly presented at said banking office, the place where the same was made payable, for payment, and payment thereof then and there duly demanded, which was refused, whereupon the said note was then and there duly protested for non-payment; of all of which the said Hammond had due notice."

The defendants, Whiteside and Warren, the indorsers, demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action against them.

3

The Supreme Court at Special Term granted a motion made by plaintiff for judgment on the demurrer as frivolous, on the ground that, although the complaint did not allege that the indorsers were given notice of the non-payment of the note, the question must be determined by the meaning given to the words "then and there duly protested for non-payment." That in *Coddington v. Davis*, 1 N. Y., 189, it (the word protest) was held to "include all those acts which by law are necessary to charge an indorser." The giving of notice to the indorser of presentment and non-payment is one of the acts necessary by law.

4

The General Term affirmed the judgment, without opinion.

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- 5 *The Court of Appeals* reversed the judgment.

FINCH, J. We do not think this demurrer was frivolous. To justify an order which so determines, or a judgment founded upon such decision, the demurrer must be not merely without adequate reason, but so clearly and plainly without foundation that the defect appears upon mere inspection, and indicates that its interposition was in bad faith. If any argument is required to show that the demurrer is bad, it is not frivolous. (*Youngs v. Kent*, 46 N. Y., 672; *Dixon C. Co. v. N. Y. Steel Works*, 57 Barb., 447.) In this case the argument has not even satisfied us

6 that the demurrer was not good. The complaint was on a promissory note, of which Hammond was maker, and Whiteside and Warren were indorsers. The complaint alleges the making of the note, the indorsement thereof, and its delivery by the maker to the plaintiff, its due presentation for payment, demand and refusal thereof, and then adds, "Whereupon the said note was then and there duly protested for non-payment; of all of which the said Hammond had notice." Here there was not only

7 no express averment that notice of protest for non-payment was given to the indorsers, but the averment that such notice was given to the maker tends to exclude the idea of an intention to aver a notice given also to the indorsers. It is claimed that the allegation that the note was "duly protested for non-payment," was itself a sufficient allegation of a notice to the indorsers. The only authority for this doctrine, as applied to a pleading, appears to be a decision at General Term (*Woodbury v. Sackrider*, 2 Abb. Pr., 402), which was itself founded upon *Coddington v. Davis*, decided in this court. (1 N. Y., 186.) The question in the latter case was not one of pleading, but upon the construction

8 of a letter waiving protest. Reading the letter in the light of the surrounding circumstances, it was very proper to give a broad and popular signification to its terms. Upon the same principle it is easy also to say that a statement in the notice sent, that the note had been protested for non-payment, was sufficient to include payment duly demanded and refused, since such protest implies the previous demand and refusal. (*Youngs v. Lee*, 12 N. Y., 554.) But these cases do not settle the rule of pleading, nor directly support the doctrine advanced in the

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single case which is brought to our notice, and which holds a 9
 pleading like this sufficient. That case, resting upon no
 pertinent authority, must be tested by sound principle, applicable
 to the question. Thus tested, it is not easily justified. We
 ought not to encourage loose or ambiguous pleading. The
 complaint is required to state, plainly and concisely, the facts
 constituting a cause of action. The pleader may not aver a
 legal conclusion as an equivalent for the groupe of separate facts
 from which it is an inference. The allegation should be such,
 and so stated, as to permit a distinct traverse and evolve a definite 10
 issue. Although pleadings are to be construed liberally, that
 does not necessarily mean that they shall be held to say what
 they do not, nor that words which have a fixed legal meaning,
 settled by the common law or by statute, shall be enlarged or
 modified by an inaccurate popular use. Such use is apt to be
 shifting and variable; adequate for ordinary purposes, but not so
 stable or precise as to safely crowd out and take the place of
 legal definitions which furnish a more accurate and unvarying
 standard. The suggestions all tend toward a conclusion that this
 demurrer was well taken, and the complaint defective as alleged. 11
 By the common law, and by statutory definition, a protest is one
 thing, and a notice of it to indorsers is quite another; and a
 note may be protested without notice of such protest being given
 to the indorsers. The one act does not necessarily assume or
 imply the other. Where the same word has different
 meanings, one the result of judicial or statutory definition, and
 the other founded simply upon an inaccurate popular use, the
 latter only can be adopted in construing a pleading where it
 plainly appears from other averments or the whole tenor of the
 paper that such was the sense in which it was employed. It is 12
 not intended to question or deny the doctrine of *Allen v.*
Patterson (7 N. Y., 476), that under the liberal rule of con-
 struction established by the Code, a word capable of two
 different meanings should have a reasonable construction, and be
 so construed as rather to support than defeat the pleading. That
 is true as a general rule where the use of the word in dispute is
 purely ambiguous, but where it has a fixed legal meaning, and
 other parts of the complaint indicate that it is used in that sense,

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13 and there is nothing from which an intention to use it in a different or popular use can be fairly implied, there is no such ambiguity as requires an arbitrary choice of meanings to support the pleading, and the sense plainly intended must prevail. Where a contrary rule would end it might be difficult to foresee. It would introduce doubt and ambiguity in the room of certainty and precision, and make a pleading lose its utility as a means of accurately evolving an issue to be tried. It is plain that the pleader in the present case did not himself understand that his
14 averment of due protest covered all the facts necessary to fix the indorsers, for he alleged every one of those facts, separately and in detail, except the last. The indorsement of the note, its maturity and due presentment, the demand of payment and refusal, the protest for non-payment, and the unnecessary allegation of service of notice of non-payment on the maker, were all stated; everything in fact except the one remaining circumstance of notice to the indorsers.

It is better to adhere to definite and fixed standards in pleading, and as far as possible encourage so much of system and accuracy
15 as is consistent with the liberal rule of the Code; and thus to require such a plain statement of the fact as will be unambiguous, present issues clearly, enable them to be distinctly and plainly traversed, and avoid legal conclusions as a substitute for a whole group of issuable facts. We think it is the better opinion in this case that the complaint was insufficient, and the demurrer well taken.

The judgment should be reversed, and the motion to strike out the demurrer as frivolous be denied with costs.

All the judges concurred.

16 Judgment reversed, and ordered accordingly.

Pahquioque Bank v. Martin, 11 Abb. Pr., 291.

PAHQUIOQUE BANK v. MARTIN.

New York Supreme Court, Special Term, 1860.

[Reported in 11 Abb. Pr., 291.]

1. Notice to an indorser of a note of the non-payment thereof, is not sufficient to charge him. He must have notice of presentment or demand and non-payment.
2. In a complaint against an indorser, an allegation that the note was duly presented and payment demanded, but it was not paid, and due notice of non-payment was given, etc., is insufficient on demurrer.

Action on a promissory note. The defendant Martin, sued as 1
an indorser thereon, demurred.

The contents of the complaint sufficiently appear in the opinion.

BONNEY, J. This action is against defendant Martin as indorser of a promissory note. The complaint, to which the defendant has demurred, states, among other things, that the note was duly presented for payment, and payment thereof demanded, but it was not paid; that the note was thereupon duly protested 2
for non-payment, "and due notice of such non-payment was given to the defendants," Martin and others.

Notice of non-payment only, is, neither directly nor by implication, notice of presentment or demand, and consequently is not notice of the dishonor of the note within a proper meaning of the word. To make an indorser liable, he must be notified in proper time that the bill or note which he has indorsed has been dishonored. (*Cook v. Litchfield*, 5 Sandf., 330; s. c. 5 Seld., 279; *Coddington v. Davis*, 1 Comst., 186; *Edw. on Bills*, 593, and 3 cases cited.)

This statement in the complaint is, in my judgment, defective. The other allegations to which objection is made are, in my opinion, sufficient.

Judgment for defendant.

Mechanics' Bank v. Straiton, 3 Abb. Ct. of App. Dec., 269.

MECHANICS' BANK v. STRAITON.

New York Court of Appeals, 1867.

[Reported in 3 Abb. Ct. of App. Dec., 269.]

1. The words "or order," "or bearer," and "bearer," in notes, bills and checks are words of negotiability, and the use of either of them makes the paper negotiable, although impersonal words be used in place of naming a payee : and if such impersonal words be used, it is negotiable by delivery without indorsement.
 2. In an action against the maker of negotiable paper, payable to bearer, it is sufficient, after alleging that defendant drew it, to allege, that it was transferred and delivered to plaintiff, without saying by whom, if it be also alleged that the transfer was for value, and that plaintiff is the owner.
- 1 The Mechanics' Bank of the city of New York sued John Straiton, Charles G. Sandford and Thomas J. Raynor, in the Supreme Court, as drawers of a bank check. The allegations of the complaint were as follows, omitting averment of plaintiff's incorporation and defendants' co-partnership :
- That, at the city of New York, on June 4, 1860, the said defendants, by their said firm name of Straiton, Sandford & Co., drew their certain bank check or draft, of which the following is a copy :
- 2 [Date and number.]
- Bank of the Republic: Pay to bills payable, or order, one thousand dollars. [Signature.]
- That said check or draft was afterward, for a valuable consideration, transferred and delivered to the plaintiff, whereby said plaintiff became, and is now, the holder and owner thereof.
- That said check was, after such transfer to the plaintiff, and on its behalf, duly presented, &c. [Here followed the usual
- 3 allegations of non-payment and notice.]
- The defendants demurred, on the ground that the check was not negotiable, and that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled at Special Term.

The Supreme Court at General Term held, that as the paper was payable to a fictitious payee, it was therefore in effect pay-

able to bearer and that the allegation that it was transferred and delivered to plaintiff for value, was a sufficient averment, in connection with the other facts appearing by the complaint, that the paper was put in circulation by the drawers; citing 15 N. Y., 425. They accordingly affirmed the judgment. Defendants appealed. 4

The Court of Appeals affirmed the judgment.

SCRUGHAM, J. The rules which establish the negotiability of commercial paper apply to bank checks as to other bills of exchange, and the doctrine that when such instruments are made payable to the order of a fictitious payee, they are to be construed and treated as payable to bearer, is too well settled to admit of serious question. In the great case of *Gibson v. Minet*, 1 H. Bl., 569, the determination proceeded upon the ground that, according to the true intent and meaning of the parties, the bill was intended to be made payable to bearer. 5

The words "or order," "or bearer," and "bearer," in notes or bills, are words of negotiability, without which or other equivalent words the instrument will not possess that quality, and therefore the use of either of these expressions by the drawer of a bill or maker of a note, must be regarded as indicating his intentions that the paper shall be negotiable. 6

By naming the persons to whose order the instrument is payable, the maker manifests his intention to limit its negotiability by imposing the condition of indorsement upon its first transfer. But no such intention is indicated by the designation of a fictitious or impersonal payee, for indorsement under such circumstances is manifestly impossible; and words of negotiability, when used in connection with such designations, are capable of no reasonable interpretation except as expressive of an intention that the bill shall be negotiable without indorsement—*i. e.*, in the same manner as if it had been made payable to bearer. 7

It was not, before the Code, necessary for the holder of an instrument payable to bearer, to allege or prove in an action against the maker the transfers through which he derived his title (2 Greenl. on Ev., § 161, and cases there cited; 3 Phill. on Ev., 4 Am. ed., 191); and it certainly is not now.

Gfroehner v. McCarty, 2 Abb. N. C., 76.

- 8 The engagement is to pay to the bearer ; and that the plaintiff is such is one of the material elements of his cause of action.

The fact must, therefore, be stated in his complaint, and its statement will be a sufficient allegation of his title ; for it is the fact, and not evidence of the fact, which is required to be pleaded.

- It is not only stated in the complaint in this action that the plaintiff is the holder and owner of the check, but also that it was transferred and delivered to him for a valuable consideration, and that he became its owner and holder by virtue of that transfer and delivery. This cannot be true unless the drawer of the check transferred and delivered it directly to the plaintiff, or to some other person by or through whom it was transferred to the plaintiff ; and this averment, if an allegation of a transfer and delivery by the drawer is necessary, is sufficient on demurrer, within the cases of *People ex rel. Crane v. Ryder*, 12 N. Y. (2 Kern.), 433, and *Prindle v. Carruthers*, 15 *id.*, 425.

All the judges concurred.

Judgment affirmed.

GFROEHNER v. McCARTY.

City Court of Brooklyn ; General Term, 1876.

[Reported in 2 Abb. N. C., 76.]

1. A complaint by payee against indorser sufficiently shows that defendant indorsed to give credit with the maker, if it alleges that, at the time of making the note, defendant indorsed it for the purpose of giving credit thereto, and that it was delivered so indorsed to the plaintiffs.
 2. In an action against a married woman as indorser, an allegation that she had a separate estate, and that, by indorsing the note as alleged, she intended to and did charge her separate estate with the payment thereof, and that the consideration of the note went for the benefit of her separate estate, is sufficient.
- 1 Appeal by defendant from judgment overruling demurrer to complaint.

This was an action by Louis P. Gfroehner, and others, against Jacob and Jennie Shepard, to recover the amount of a promis-

sory note, made by the defendant Jacob Shepard, payable to the order of the plaintiffs, and indorsed by the defendant Jennie Shepard at the time the note was made. 2

The allegation of the complaint in respect to such indorsement is as follows: "That at the time of making the said note the defendant Jennie Shepard was a married woman, and the wife of the defendant Jacob Shepard, and was and is seized and possessed of a separate estate, and at the time of the making of said note, and for the purpose of giving credit thereto, said defendant Jennie Shepard indorsed said note, and in and by said indorsement she intended to and did charge her separate estate with the payment thereof, and that the consideration of said note went for the benefit of her said separate estate." 3

The defendant Jennie Shepard demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and appealed from the order overruling demurrer and the judgment entered thereon.

REYNOLDS, J. The appellant is right in the position, that as a general rule the indorser of a note payable to the order of another is presumed to have intended to become liable as second indorser, and is not liable upon the note to the payee, who is supposed to be the first indorser. But this presumption may be rebutted by showing that the indorsement was made to give the maker credit with the payee; in which case the party so making it became liable as first indorser (*Coulter v. Richmond*, 59 N. Y., 478). 4

That is what is substantially alleged in the complaint in this action. It is stated that the defendant Jennie Shepard, at the time of the making of the note, indorsed the same *for the purpose of giving credit thereto*, and that said note was delivered so indorsed to the plaintiffs. In such connection the allegation that the indorsement was for the purpose of giving credit to the note must mean that it was to give the maker credit with the payee; that is, she became security for the maker. The case is thus brought within a line of decisions, one of which is cited above. 5

The further allegations of the complaint show the con-

Draper v. The Chase Mfg. Co., 2 Abb. N. C., 79.

- 6 sideration for the contract thus made by said defendant, and that the contract was made in such form as to bind her, a married woman. It is alleged that the consideration of the note was for the benefit of her estate, and that by the endorsement she charged her separate estate with the payment of the note. These facts, if proved, establish her liability (see *Yale v. Dederer*, 18 N. Y., 265; 22 *id.*, 450; *Owen v. Cawley*, 36 *id.*, 600; *Ballin v. Dillaye*, 37 *id.*, 35).

Judgment affirmed.

McCUE, J., concurred.

DRAPER v. THE CHASE MANUFACTURING COMPANY.

N. Y. Supreme Court, First Department; Special Term, 1877.

[Reported in 2 Abb. N. C., 79.]

Where, in an action by the payee of a promissory note against an indorser, it was alleged in the complaint that after the making of the note it was indorsed by the defendant, and thereupon transferred for value to the plaintiff; *Held*, on demurrer to the complaint, that this was not a sufficient averment to admit proof to rebut the presumption that the payee was the first indorser, and therefore not liable to him. There should have been an allegation that the plaintiff parted with value upon credit of the indorsement in order to hold the defendant liable.*

- 1 Action on a promissory note against the maker and an alleged indorser.

- The complaint, after alleging the incorporation of the defendants, alleged that on the 10th day of August, 1875, at the city of New York, the defendant Frank W. Allen made a certain promissory note in writing, bearing date on that day, and thereby for value received promised to pay the plaintiff or order the sum of
- 2 two hundred and fifty dollars; and the defendant, the Chase Manufacturing Company, afterwards indorsed the said promissory note, and the same was thereupon for value received transferred to said plaintiff, who was the lawful owner and holder thereof.

* Compare preceding case.

The complaint contained proper allegations of protest and notice of non-payment to charge defendant as indorser. 3

The defendant company demurred to this complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and claimed that, the plaintiff being the payee of the note, the complaint contained no sufficient allegation to admit of proof to overcome the presumption that the Chase Manufacturing Company intended by their indorsement only to become liable as second indorser, and so not liable to the payee.

VAN BRUNT, J. [*after stating the facts*]: It is the well settled rule in this state that, in order to overcome such presumption, the payee must show that the note was thus indorsed to give credit to the note with the payee, and that the payee has parted with value upon the credit of such indorsement (*Herrick v. Carman*, 12 Johns., 160; *Nelson v. Dubois*, 13 *id.*, 175; *Campbell v. Butler*, 14 *id.*, 349; *Hall v. Newcomb*, 7 Hill, 416; *Moore v. Cross*, 19 N. Y., 227; *Bacon v. Burnham*, 37 *id.*, 614; *Phelps v. Vischer*, 50 *id.*, 69; *Coulter v. Richmond*, 59 *id.*, 478). 4

It is as well settled that the complaint must allege every fact which it is necessary the plaintiff should prove in order to recover (*Kelsey v. Western*, 2 N. Y., 506; *Conkling v. Gandall*, 1 Abb. Ct. App. Dec., 423). 5

The allegation in the complaint that the Chase Manufacturing Company afterwards indorsed the said promissory note, and that the same was thereupon for value received transferred to the plaintiff, it seems to me, is wholly insufficient to admit of proof to rebut the presumption above referred to. There is no allegation that the company indorsed the note to give credit to it with the payee, nor that the payee parted with anything upon the credit of such indorsement. The allegations contained in the complaint that the note was, after indorsement for value received, transferred to the plaintiff, contained no allegation that that value was parted with upon credit of the indorsement, which allegation is essential to a recovery. 6

Demurrer sustained.

 Note on Actions on Paper Payable on Demand.

NOTE ON ACTIONS ON PAPER PAYABLE ON DEMAND.

- 1 A bill of exchange, or note, payable on demand, is payable immediately, and no demand is necessary before suing the maker. Tied. on Com. Paper, § 310, and cas. cit.; *Wheeler v. Warner*, 47 N. Y., 519; (a provision that the note bears interest does not change the rule.)

This principle of dispensing with a demand before suit, is not confined to bills and notes, but applies to all express agreements to pay money, if absolute, even though at a specified time and place. Tied. on Com. Paper, § 310, and cas. cit. *Locklin v. Moore*, 57 N. Y., 360, aff'g 5 Lans., 307; (agreement to pay, for goods sold, at defendant's store on a specified day.)

- 2 The only effect of qualifying a promise to pay by the mere specifying of demand at a fixed time and place, is, that if the debtor is ready with the money at that time and place, and no demand is made, he is exonerated from paying costs and interest for subsequent time, provided he keeps ready, pays the money into court when sued, and pleads these facts in his answer. Tied. on Com. Paper, § 310, and cas. cited; *Locklin v. Moore*, 57 N. Y., 360.

Readiness at the time and place, and offer to pay at the trial is not enough. *Locklin v. Moore* (*above*).

- 3 A note payable on demand, or in any terms which make it payable, absolutely at the will of the holder, is immediately due, for the purpose of suing the maker, and therefore for the setting the statute of limitations running in favor of the maker. *Wheeler v. Warner*, 47 N. Y., 519; *Howland v. Edmonds*, 24 N. Y., 307; (note by a member of a mutual insurance company, expressed to be payable "in such portions and at such time or times as the directors * * * may * * * require." Such a note is intended as a cash security).

Otherwise, of an assessment or call on a subscription for stock. *Glenn v. Marbury*, 145 U. S., 499.

Compare Code Civ. Pro., § 410, statute (where right exists) running from the time the right to make demand is complete.

- 4 On a note payable on demand with interest, demand of maker is necessary in order to charge an indorser. Tied. on Com. Paper, § 310, and cas. cit.; *Merritt v. Todd*, 23 N. Y., 28.

For this purpose the demand is too late, if it be delayed until the statute of limitations has run in favor of the maker. After the statute has run, demand on the maker cannot avail to charge the indorser. *Shutts v. Fingar*, 100 N. Y., 539.

If a note is payable at a particular place, actual demand there is necessary in order to charge the indorser. Tied. on Com. Paper, § 310, and cas. cit. Demand by letter is not enough. *Parker v. Stroud*, 98 N. Y., 379.

Graham v. Camman, 13 How. Pr., 360.

If the contract is to deliver "on surrender of this receipt" a demand and tender of the receipt is essential in an action for breach of the contract. *Ganley v. Troy City Nat. Bk.*, 98 N. Y., 487, 495. 5

Where the contract makes demand a condition of plaintiff's right—as on a continuing bailment, the statute of limitations does not begin to run against an action on the contract (as distinguished from an action for conversion) until from time of demand. Code Civ. Pro., § 410, subd. 2; *Ganley v. Troy City Nat. Bk.*, 98 N. Y., 487, 493.

As to a fiduciary who is entitled to have demand made on him, the statute begins to run against an action for money or property received or detained, from the time when he who had a right to demand had actual knowledge of the facts on which that right depends. Code Civ. Pro., § 410, subd. 1. 6

GRAHAM v. CAMMAN.

New York Superior Court, General Term, 1856.

[Reported in 5 Duer, 697; s. c. 13 How. Pr., 360.]

1. A complaint held good on demurrer which stated substantially that on a day specified an account was stated between the parties, and that upon such statement a specified balance was found due from the defendant to the plaintiff, which balance defendant thereupon agreed to pay, but has refused so to do. c
2. A demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action raises only such objections as render it bad on general demurrer at common law, or bad for want of equity in chancery.
3. If defendant requires a greater degree of certainty in the complaint, his remedy is to move that it be made more definite and certain.

Action on an account stated. 1

The complaint was as follows:

That the defendant, on the 10th of May, 1855, became and was indebted to the plaintiff in the sum of \$446.25, upon a balance of an account stated, and then due and owing to this plaintiff; and which the said defendant then and there agreed and promised to pay, but that he has neglected and refused to pay the same, except the sum of \$150 paid by him to the plaintiff on the 22d day of August, 1855, on account of the aforesaid balance of indebtedness. And further, that the

Graham v. Camman, 13 How. Pr., 360.

- 2 defendant remains indebted to the plaintiff in the sum of \$296.25, with interest, etc. For that amount and costs judgment is demanded.

Defendant demurred, assigning as ground that the complaint did not state facts sufficient to constitute a cause of action.

At Special Term the demurrer was overruled.

Defendant appealed.

The Court at General Term affirmed the order.

- 3 HOFFMAN, J. [*after stating above facts*]: We think the complaint, although loosely drawn, may, upon general demurrer, be treated as stating substantially that on the 10th of May, 1855, an account was stated between the plaintiff and defendant; and that, upon such statement, a balance of \$446.25 was found due to the plaintiff from the defendant. A promise to pay this balance is averred, a payment of \$150 on account, a refusal to pay the rest, and an allegation that the residue, viz., \$296.25, is now justly due from the defendant.

- 4 This case cannot be well distinguished from that of *Cudlip v. Whipple*, in this court (1 Abb. Rep., 106). The difference is only in the omission to state the nature of the items of the account, viz., for money paid, laid out and expended. It was not alleged that the account had been stated. That case was decided upon *Allen v. Patterson* (3 Seld., 496), holding that a complaint in an action for the recovery of goods sold, substantially in the old form of a declaration in *indebitatus assumpsit*, was good under the code.

- 5 The old form of a declaration on an account stated is found in 2 Chitty Plg., 90. It was: "That, whereas the defendant had, on, etc., at, etc., accounted with the plaintiff of and concerning divers sums of money from the defendant to the plaintiff, before that time due and owing and then in arrear and unpaid; and upon such accounting the said defendant was then and there found in arrear and indebted to the plaintiff in the sum of \$——, and thereupon, being so indebted, he promised to pay, etc."

It is obvious that the sixth subdivision of the 144th Section of

Graham v. Camman, 13 How. Pr., 380.

of the Code as to demurrers [Code Civ. Pro., §488, Subd. 8] 6
has been framed from the form of the general demurrer at com-
mon law or in equity. Such must have gone to the whole
cause of action and be for matter of substance, not of form.
(See Chitty on Pleading, 664, and cases.)

In *Richards v. Beairs* (28 Eng. L. & Eq. Rep., 157), the ques-
tion was under the 50th Section of the common law procedure
act, which is substantially the same as the 6th subdivision
referred to. The court say that the question was whether the
declaration would have been good upon general demurrer before
the act, and it was held bad upon that ground. COMPTON, J., 7
said: "If we are to hold pleadings good where the parties do
not choose to say what they mean, we should be getting into the
region of ambiguity and uncertainty, which would be a worse
evil than that which the statute intended to remedy."

The rule was well stated in *Richards v. Edich* (17 Barb., '260).
A demurrer under the 6th subdivision applies only to such
defects as would render the count bad upon general demurrer at
law, or bad for want of equity in chancery. The complaint,
therefore, to be overthrown by such a demurrer must present 8
defects so substantial in their nature and so fatal in their charac-
ter as to authorize the court to say, taking all the facts to be
admitted, that they furnished no cause of action whatever.
Where the demurrer admits facts enough to constitute a cause
of action, the complaint will be sustained; and if the defendant
requires a greater degree of certainty than is found in the com-
plaint, he must seek his relief by a motion under the Code that
the pleading be made more certain and definite.

We consider the rule as thus stated to be a true and beneficial 9
one; and it is so to be regarded in this court.

Order of Special Term overruling demurrer affirmed.

WOODRUFF and BOSWORTH, JJ., concurred.

Fowler v. N. Y. Indemnity Ins. Co., 26 N. Y., 422.

FOWLER v. N. Y. INDEMNITY INS. CO.

New York Court of Appeals, 1863.

[Reported in 26 N. Y., 422.]

1. In an action on a fire policy the complaint must show that the plaintiff had an insurable interest in the property insured.
2. If it shows that plaintiff is an assignee of the policy, and that the insurable interest was in the assignor at the time the policy was issued, and that the assignment of the policy to plaintiff was before the loss, it must also show that plaintiff had acquired an insurable interest in the property at the time of the loss.
3. Otherwise, *it seems*, of a marine policy.

1 Action on a fire policy.

The allegations of the complaint were :

[I.] That the defendants are a corporation, duly incorporated under the laws of the State of New York, having full power and authority to make the contract hereinafter set forth.

- [II.] That in and by a certain policy of insurance duly issued by the said defendants, and numbered 2002, and duly signed by the president and secretary of said defendants, and duly counter-
- 2 signed by the agent of the company at Newburgh, in the county of Orange, on the 6th of January, 1853, the defendant, in consideration of the sum of thirty dollars, to them paid by Robert Caldwell, of [*etc.*], did insure him against loss or damage by fire to the amount of two thousand dollars on his [*describing the structures*], and the said defendants, in and by the said policy of insurance, did promise and agree to make good unto the said Robert Caldwell, his executors, administrators and assigns, all
- 3 such loss or damage not exceeding in amount the sum insured as aforesaid, as should happen by fire to the property as therein and herein specified during the term of one year from the 6th day of January, 1853, to the 6th day of January, 1854, the said loss or damage to be estimated according to the true or actual value of said property at the time such loss or damage should happen, and to be paid within sixty days after notice and proof thereof, made in conformity to the condition annexed to the said policy, provided, and upon the condition in said policy mentioned and

expressed, as by the said policy of insurance, reference being 4
thereunto had, will more fully appear.

[III.] That on or about July 7, 1853, and while said contract
of insurance was remaining in full force and effect, the said
[*designating the structures*] mentioned in said policy of insur-
ance, were destroyed by fire, excepting portions of the walls of
said three-story building and parts of said water-wheel.

[IV.] That the true and actual cash value of the said [*struct-*
ures], so destroyed by fire, at the time of the destruction thereof
was at least the sum of \$3,400—and that the loss sustained by 5
such fire was at least the sum of \$2,200.

[V.] That on the sixth day of January, 1853, the said Robert
Caldwell hereinbefore named, by and with the written assent
and approval of the defendants duly made, given and indorsed
in said policy, to which assent and approval the plaintiff prays
leave to refer, duly assigned and transferred to the plaintiff, his
executors, administrators and assigns, all the right, title and
interest of said Robert Caldwell in and to the aforesaid policy
of insurance.

[VI.] That on the twelfth day of July, 1853, the said Robert 6
Caldwell made and executed to Chauncey F. Belknap, of New-
burgh, Orange County, a general assignment of all his property,
real and personal, in trust for the payment of his debts.

[VII.] That the plaintiff is now, and at the time of the
destruction by fire of said property, insured, as aforesaid, was,
the lawful owner and holder of said policy of insurance, and as
the lawful owner and holder of the claim and demand arising
and accruing against the defendant because of the destruction
by fire of the property mentioned in said policy, and is entitled 7
to have, demand and receive from the defendants the amount of
the loss or damage sustained by the destruction of the property
aforesaid by fire as aforesaid.

[VIII.] That plaintiff has performed and complied with the
conditions of the said contract of insurance on the part of the
said Robert Caldwell, or his assigns, to be kept and performed.

[IX.] That after the destruction of said property by fire as
aforesaid, the plaintiff forthwith gave notice thereof to the
defendants, and within a reasonable time thereafter, and as soon

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- 8 as possible, to wit, on the 18th day of July, 1853, the plaintiff delivered to the defendants as particular an account of said loss as the nature of the case would admit, which account was signed by the said Robert Caldwell and verified by his oath, declaring the same to be true and just; and on the 22d day of August, 1853, the plaintiff delivered to the defendants a further account of said loss, which account was signed by the said Robert Caldwell, with his own hand, and verified by his oath, declaring the same to be true and just, which said account contained all the particulars required to be stated therein by the conditions annexed to said policy, and the account herein first mentioned was accompanied with the affidavit of two disinterested respectable persons, not contiguous to the place of the fire, and not concerned in the loss as creditors or otherwise, or related to the insured or sufferer, to the effect that they had made due inquiry into the cause and origin of the fire, and also as to the value of the property destroyed, and that they were acquainted with the circumstances and character of the said insured, and they verily believed that he had really, and by misfortune, and without
- 9 fraud or evil practice, sustained by such fire loss and damage to the amount of not less than \$2,200 on the said property insured as hereinbefore set forth, and was likewise accompanied by a certificate of a resident magistrate to the effect that he was acquainted with the two persons making such affidavit, and that he believed them to be men of honor and integrity; and that the statement and account herein secondly mentioned, and so signed and verified, stated that the withholding of the payment of the amount due and owing on the said policy of insurance from the plaintiff, the assignee of the same, would greatly
- 11 prejudice the interest of the said Robert Caldwell, the assignor thereof, and was accompanied by the written assent of the said Chauncey F. Belknap, assignee of said policy as aforesaid, that the plaintiff might receive the amount of said policy from the defendants; and this complaint further shows that the withholding of the payment to the plaintiff of the amount insured as aforesaid, to wit, the sum of \$2,000, will prejudice the interests of the assignor of said policy from the defendants.

[X.] That although more than sixty days have elapsed since

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the said notice and proof were delivered to the defendants, yet 12
the defendants have hitherto wholly neglected and refused, and
still do neglect and refuse, to pay the plaintiff the amount of
said policy of insurance.

[XI.] That the defendants, by reason of the premises, have
become and are indebted to plaintiff in the sum of \$2,000, with
the interest thereon, from the 18th day of September, 1853.

FOR WHICH SUM of money with interest as aforesaid the plaintiff
demands judgment against the defendants, besides the costs
of suit.

Defendants demurred, assigning as ground that the complaint 13
“does not state facts sufficient to constitute a cause of action.”

The Supreme Court at Special Term (BROWN, J.), overruled
the demurrer, holding (1) that the allegation that the policy was
on “his” (Caldwell’s) “three-story building,” etc., was a suffi-
cient allegation that Caldwell had an insurable interest, and that
his interest was as owner.

(2) That in alleging the assignment it was not necessary to
state any consideration. 14

The General Term affirmed the judgment without further
opinion.

The Court of Appeals reversed the judgment.

DAVIES, J. The radical defect in the complaint is, that it con-
tains no averment of interest, either in the plaintiff or in his
assignor, in the subject matter of the insurance. This court, in
the case of *Ruse v. Mutual Benefit Life Insurance Company*
(23 N. Y., 516), distinctly enunciated the proposition that a
policy obtained by a party who has no interest in the subject of 15
insurance is a mere wager policy. It was said in that case that,
aside from authority, this question would seem to be of easy
solution. Such policies, if valid, not only afford facilities for a
demoralizing system of gaming, but furnish strong temptations
to the party interested to bring about, if possible, the event in-
sured against. In respect to insurances against fire, the obvious
temptation presented by a wagering policy to the commission of
the crime of arson, has generally led the courts to hold such

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- 16 policies void, even at common law. It was so held in England at an early day by Lord Chancellor King, in *Lynch v. Dalzell* (4 Bro. P. C., 431), and by Lord Hardwicke in *Saddlers' Company v. Budcock* (2 Atk., 557); and the courts in this country have generally acquiesced in and approved of the doctrine. In this state such policies would fall under the condemnation of our statute avoiding all wagers and gambling contracts of every sort; but they would, no doubt, also be held void, independently of the statute, at common law. In *Howard v. The Albany Insurance Company* (3 Denio, 301), BRONSON, Ch. J., asserted the
- 17 necessity of an interest in the assured in all cases, referring, in support of the doctrine, not only to the statute, but to the decisions of Lords King and Hardwicke (*supra*); and, in this latter case, Judge Bronson insisted that, in fire policies, the assured must have an interest at the time of the loss, as well as when the contract is made. I understand the same doctrine to be distinctly affirmed by this court in the case of *Murdock v. Chenango Mutual Insurance Company* (2 N. Y., 210), viz., that upon a policy against loss by fire, no recovery can be had unless the
- 18 insured has an interest in the subject insured at the time of the loss; and an established rule in pleading was enunciated in that case, that the plaintiff or plaintiffs must aver every fact necessary to show a right to recover, and every such necessary averment must be proved.

- In *Peabody v. Washington County Mutual Insurance Company* (20 Barb., 340), the plaintiff, Peabody, sued as assignee on a policy issued to his assignor, one Riggs, who was also a co-plaintiff. The complaint averred the insurance on the property of Riggs and the assignment of the policy to Peabody as collateral
- 19 security. Demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court held the demurrer well taken as to the plaintiff, Peabody, as it did not appear by the complaint that he had any interest at any time in the property insured, and this was fatal to his right to recover; and the court repeats the well-established rule; that the insured must not only have an interest in the subject matter of the insurance at the time of insuring, but also at the time the loss happens—(citing 3 Kent's Com., 371, 375, 4th ed.)

The interest of the assignee must be stated in the complaint, 20 as well as the fire and other necessary facts, to make out a cause of action. (*Granger v. Howard Ins. Co.*, 5 Wend., 202.) The learned judge who delivered the prevailing opinion in support of the complaint in the Supreme Court, says, it is not ordinarily necessary for the plaintiff to allege in his complaint anything which he is not bound to prove in order to make out his case. Hence, he says, it was held, and he believes very generally, that an averment of interest is unnecessary in declaring on a policy of insurance—citing, as authorities, *Nantes v. Thompson* (2 East, 385, per Grose, J.); *Clendening v. Church* (3 Caines, 141); *Bu-* 21
chanan v. Ocean Insurance Company (6 Cow., 332). He says it is true that all these cases were before the passage of our statute to prevent betting and gaming. All of these cases, as is shown in the case of *Freeman v. Fulton Fire Insurance Company* (14 Abb., 398), decided by the General Term of the second district since this demurrer was overruled, were cases of marine insurance. In such cases an averment of interest was unnecessary, for such policies were valid as wager policies, although the plaintiff in fact had no interest in the subject insured. It fol- 22
lows, therefore, that neither an averment nor proof of interest could be required to sustain a recovery on such a policy. (*Buchanan v. Ocean Ins. Co.*, *supra*.)

In the case of *Freeman v. Fulton Fire Insurance Company* (*supra*), the Supreme Court held a complaint defective which did not contain on averment that the plaintiff had an interest in the thing insured at the time of the loss, unless the claim was assigned to him after the loss. In the present case, the policy was assigned before the loss; and, therefore, before the plaintiff could recover, he must prove his interest, and such proof being 23
essential, the interest must be averred in the complaint.

The judgment of the General and Special Terms must be reversed, and judgment for defendant, with costs. The plaintiff to have leave to apply to the Supreme Court to amend his complaint in proper terms.

All the judges concurred.

Ordered accordingly.

Brown v. Champlin, 66 N. Y., 214.

BROWN v. CHAMPLIN.

New York Court of Appeals, 1876.

[Reported in 66 N. Y., 214.]

1. A complaint on a sealed bond need not state who was the real as distinguished from an apparent principal in the obligation to secure which it was given.
2. An instrument or transaction may be pleaded by stating it according to its legal effect.
3. The complaint alleged the making of a bond by defendants, and its assignment by the obligors to plaintiff. The evidence showed that defendants made it for accommodation to enable the obligees to obtain a loan from the assignee, now plaintiff, and that the obligees before assigning it were required to indorse their consent to be jointly liable with the obligors. *Held*, not a variance, as defendants could not have been misled.

1 Action on a bond.

The allegations of the complaint were :

- First.*—That heretofore and on or about the 17th day of June, 1869, the defendants, Oliver H. P. Champlin, Seth Clark, Edwin A. Holbrook, Salmon Shaw and Henry S. Cunningham, executed under their hand and seal, and delivered to Frederick W. Breed and Charles E. Young a bond bearing date on that day in the penal sum of \$10,000, with a condition thereunder written in
- 2 substance, that if the obligors in the said bond, their heirs, executors, administrators should pay or cause to be paid to the obligees in the said bond named, their executors, administrators or assigns the sum of \$5,000 on or before the 15th day of August next thereafter following, then the said bond to be void, otherwise to be and remain in full force as by the said bond ready to be produced as this court shall direct, will more fully appear.

- 3 That thereafter and on or about the 17th day of June, 1869, the said Frederick W. Breed and Charles E. Young, did for a valuable consideration to them in hand, paid by this plaintiff, sell, assign, transfer to this plaintiff the said bond and the money and moneys due and to become due thereon ; that the plaintiff is now the sole, true and lawful owner and holder of the said bond ; that of the moneys secured to be paid by the said bond, there is now due and remaining unpaid the sum of \$975 and interest

thereon from the first day of May, 1873; that no action or proceeding has ever been brought, instituted or taken to recover the moneys so, as aforesaid, due and unpaid on the said bond or any part thereof. 4

Second.—For a second and further cause of action herein against the defendants, the plaintiff states the following facts. That heretofore and on or about the 17th day of June, 1869, at the city of Buffalo, Erie county, and state of New York, the defendants, Seth Clark, Edwin A. Holbrook, Salmon Shaw, Oliver H. P. Champlin and Henry S. Cunningham, covenanted with Frederick W. Breed and Charles E. Young, under their hands and seals, to pay to the said Frederick W. Breed and Charles E. Young, or their assigns, the sum of \$4,000 on or before the 16th day of August next thereafter with interest thereon from the date thereof. That thereafter, and on or about the 17th day of June, 1869, the said Frederick W. Breed and Charles E. Young, the owners and holders of said bond, did for a valuable consideration to them in hand, paid by this plaintiff, sell, assign and transfer the said bond and the money and moneys due and to grow due thereon to this plaintiff; that there is now due and unpaid on said bond the sum of \$975 and interest thereon from the first day of May, 1873. 5 6

That the plaintiff is now the sole, true and lawful owner and holder of the said bond; that there is now due and owing this plaintiff by these defendants the sum of \$975 and interest thereon from the first day of May, 1873; that payment has been demanded; that the defendants neglect to pay the same; wherefore and by reason of the facts above stated the plaintiff demands a judgment herein against the defendants for the sum of \$975 and interest thereon from the first day of May, 1873, and the cost of this action. 7

At the trial in the Supreme Court it appeared that a joint stock company, in which Breed and Young were stockholders, desired a loan, and obtained it by inducing the obligors to execute their bond to Breed and Young, and that defendants, after signing the bond and before it could be assigned to plaintiff, made it a condition that, before it should be delivered, Breed and Young should execute an indorsement declaring themselves to be

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- 8 jointly liable in all respects with the original makers, which they did by an indorsement not under seal. Judgment for plaintiff.

The General Term, without opinion, affirmed the judgment.

The Court of Appeals affirmed the judgment.

CHURCH, Ch. J. The learned counsel for the defendants asks for a reversal of the judgment in this action, upon three grounds: 1. That the recovery was for a different cause of action from that set forth in the complaint. 2. For usury. 3. For defect of parties defendant.

- 9 The first ground is clearly untenable. The complaint contains two counts. The first alleges the making and delivery by defendants of a bond in the penal sum of \$10,000, conditioned to pay Breed & Young \$5,000, and an assignment for value by the latter to plaintiff. The second count alleges that the defendants covenanted under their hands and seals to pay Breed & Young \$4,000, which covenant was assigned by the latter to plaintiff for value. The recovery was substantially for the cause of action set forth, although some of the circumstances as proved
10 and found attending it were not averred.

- It is found that the defendants and Breed and Young were stockholders in a North Carolina gold mining company, and agreed with the plaintiff for a loan to the company of \$4,000, to be secured by a mortgage of the company upon its real estate in North Carolina, and the bond of the defendants. The omission to state the relation of the parties to the company and the application for the loan, or that Breed and Young were nominal obligees only, or all the terms of the assignment, or that the loan was made to the company, did not make a failure of proof of the
11 cause of action set up in the complaint, nor a substantial variance, and certainly not one which could have misled the defendants. It is unnecessary to set forth the evidence or the circumstances attending the transaction. It is sufficient to charge the legal effect of a transaction, contract or instrument in writing.

[*The part of the opinion not relating to the pleading is here omitted.*]

All the judges concur. FOLGER, J., absent.

Judgment affirmed.

Bostwick v. Van Voorhis, 91 N. Y., 353.

BOSTWICK v. VAN VOORHIS..

New York Court of Appeals, 1883.

[Reported in 91 N. Y., 353.]

1. The provision of 2 R. S., 378 (5th ed., vol. 3, p. 661; 6th ed., vol. 3, p. 641), § 5, formerly in force—requiring specific breaches to be assigned in actions on bonds conditioned otherwise than for payment of money—was sufficiently complied with by a general allegation of acts which are contrary to the condition, though without specifying times, places, amounts, etc.
2. If not sufficient, the remedy is by motion to make more definite and certain, or for particulars.

The material allegations of the complaint were [*after alleging the incorporation of the bank of which plaintiff was receiver*]: That after the said organization one Alexander Bartow made application for the appointment of cashier, and therewith presented his bond, duly executed by himself and specified persons, as follows: [*the bond, set forth in the complaint in full, was in the usual form of a joint and several bond, in the penal sum of \$30,000, and conditioned as follows*]: “The condition of this obligation is such that, whereas the above bounden, Alexander Bartow, has been duly appointed cashier of the said National Bank of Fishkill, now if the said Alexander Bartow shall well, honestly and faithfully discharge the duties of such cashier, rendering at all times his undivided care and services to said bank, and shall obey the orders and directions of the president and directors of said bank lawfully given, and shall at all times account for and pay over all moneys which have come, now are, or hereafter may come into his hands, belonging to said bank, and shall keep true and accurate books of all the affairs of the said bank intrusted to him, then the above obligation to be void, or else to remain in full force and virtue. [*Rest omitted here.*]

That said bond was accepted by said bank, and said Bartow entered upon his duties as cashier.

III. That said Alexander Bartow, during the time he continued to act as such cashier, did not honestly and faithfully discharge the duties of such cashier, and did not render at all

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4 times his individual care and services to said bank, and did not obey the orders and directions of the president and directors of said bank lawfully given, and did not at all times account for and pay over all moneys which came into his hands, belonging to said bank, and did not keep true and accurate books of all the affairs of the said bank entrusted to him. But, on the contrary thereof, the said Alexander Bartow paid out the moneys of said bank fraudulently to various persons, without any sufficient vouchers or security therefor, and fraudulently permitted
5 various persons to overdraw their accounts without any security, and fraudulently altered and falsified the accounts and books of said bank so as to conceal said fraudulent doings, and has refused to pay over to the president and directors of said bank large sums of money, to wit., \$100,000 and over, refusing to account for the same, to the damage of the said National Bank of Fishkill of \$100,000.

[*The remaining allegations are not material to the present inquiry*].

The former statute, 2 R. S., 378 (5th ed., vol. 3, p. 661 ; 6th ed.,
6 vol. 3, p. 641) § 5, requiring plaintiff to "assign specific breaches" is as follows :

"When an action shall be prosecuted in any court of law upon any bond for the breach of any condition other than the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff in his declaration shall assign the specific breaches for which the action is brought."

The present statute, Code Civ. Pro., § 1915, is as follows :

7 § 1915. A bond in a penal sum, executed within or without the state, and containing a condition to the effect that it is to be void upon performance of any act, has the same effect for the purpose of maintaining an action or special proceeding, or two or more successive actions or special proceedings thereupon, as if it contained a covenant to pay the sum or to perform the act specified in the condition thereof. But the damages to be recovered for a breach, or successive breaches, of the condition, cannot, in the aggregate, exceed the penal sum, except where the condition is for the payment of money ; in which case they

cannot exceed the penal sum, with interest thereupon from the 8
time when the defendant made default in the performance of
the condition.

The General Term of the Supreme Court refused to consider whether the form in which the breaches were assigned in the complaint was imperfect, holding that it was a mere question of pleading, which may be waived by a failure to object in time.

The Court of Appeals affirmed the judgment.

EARL, J. [*after reciting the condition of the bond*]: Upon 9
the argument before us several objections to the recovery were
urged upon our attention, which we will consider separately.
First. It is said that the complaint should have been dismissed
because it did not assign specific breaches of the bond. This
objection is based upon section 5, article 2, title 6, chapter 6,
part 3, of the Revised Statutes, which provides that "when an
action shall be prosecuted in any court of law upon any bond
for the breach of any condition other than for the payment of
money, or shall be prosecuted for any penal sum for the non-
performance of any covenant or written agreement, the plaintiff 10
in his declaration shall assign the specific breaches for which
the action is brought." The counsel for both parties assumed
that this provision of the statutes was in force when this action
was commenced in 1877; and, without determining whether it
was or not, we think it was sufficiently complied with. It was
alleged in the complaint that Bartow did not honestly and faith-
fully discharge his duties as cashier; that he did not render at
all times his individual care and services to the bank; that he
did not obey the directions of the president and directors of the
bank, lawfully given; that he did not at all times account for 11
and pay over all moneys which came into his hands belonging to
the bank, and did not keep true and accurate books of all the
affairs of the bank intrusted to him; but that, on the contrary
thereof, he paid out the moneys of the bank fraudulently to
various persons, without any sufficient vouchers or security
therefor, and fraudulently permitted various persons to over-
draw their accounts without, any security, and fraudulently
altered and falsified the accounts and books of the bank so as to

Hopper v. Town of Covington, 118 U. S., 148.

12 conceal such fraudulent doings, and that he has refused to pay over to the president and directors of the bank large sums of money, to wit, \$100,000 and over, refusing to account for the same, to the damage of the bank, \$100,000.

These allegations of breaches of the bond on the part of Bartow were a sufficient compliance with the statute. If they were not, no reason was thereby furnished for dismissing the complaint. The defendant could have applied to the court, by motion, to have them made more specific and definite, or for a
13 bill of particulars.

[*The residue of the opinion does not involve any question of pleading.*]

All the judges concurred.

Judgment affirmed.

HOPPER v. TOWN OF COVINGTON.

United States Supreme Court, 1886.

[Reported in 118 U. S., 148.]

1. In an action on negotiable bonds issued by a town which had been authorized to make such bonds for specified purposes only, it is not enough for the plaintiff to aver in general terms that the town was authorized to issue the bonds in suit; but he must state the facts which bring the case within the special authority.
 2. A complaint in such a case is demurrable if, as to this point, it only alleges that defendant was a municipal corporation, existing under the laws of the state, with full power and authority pursuant to those laws, to execute negotiable commercial paper, and that pursuant to those laws it executed the bond sued upon, and does not show the purpose for which the bond was made.
 3. A demurrer admits only facts well pleaded.
 4. An allegation cannot avail which is inconsistent with a fact of which the court can take judicial notice.
- 1 Action in the United States Circuit Court for the District of Indiana, upon municipal bonds issued by the defendant, the town of Covington.

The Original Complaint, after describing the parties, merely alleged that the defendant had executed her certain bond No. 14 and attached thereto a coupon No. 7, a copy of which said coupon

is filed herewith and made part hereof, marked Exhibit A, by the terms of which said coupon defendant promised to pay to the bearer thereof, etc., etc., etc., stating terms, default, and that plaintiff is holder, etc. A copy of the coupon was then set forth. 2

A second paragraph alleged another coupon in the same way.

A third paragraph enumerated sixty other coupons, and a stipulation of the attorneys was annexed that to avoid unnecessary repetition the complaint should be treated as if each coupon had been pleaded in a separate paragraph with a copy attached.

Defendant demurred. 3

Plaintiff then served *an Amended Complaint* in which, after describing the parties, he alleged "that heretofore, to wit, on Oct. 1, 1870, the defendant, by its board of trustees, upon a petition to said board of trustees of the citizen owners of five-eighths of the taxable property of the said town," as evidenced by the assessment roll [etc., etc., detailing the proceedings], executed its bonds, numbered respectively, 14, 15, [etc., etc., describing them and the coupons annexed, and enumerating those purchased by plaintiff, and annexing a copy of one as typical of the form of all, and claiming judgment upon all.] 4

A similar stipulation was annexed.

An Amended and Supplemental Complaint was afterwards filed by plaintiff, in which, after describing the parties as before, he alleged, "That said defendant is a municipal corporation, organized and existing under and by virtue of the laws of the state of Indiana, with full power and authority, pursuant to the laws of said state, to execute negotiable commercial paper; that pursuant to the laws of said state regulating the execution of such negotiable commercial obligations said defendant, on the first day of October, 1870, by its proper officers and agents, executed its negotiable commercial bond payable to bearer ten years after date, at the Farmers' Bank in Covington, Indiana, which bank was then a bank of deposit and discount at said town of Covington, Indiana; that thereafter and before the maturity of said bond plaintiff purchased the same for a valuable consideration, and is still the owner thereof; a copy of said bond is filed herewith and hereby made part of this complaint, marked Exhibit A." 5

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6 This complaint then alleged that the plaintiff was the owner of a specified number of other bonds of precisely like tenor and effect; except that they were differently numbered, and that twenty of them were for one hundred dollars each [*stating the numbers and amounts of each*], "that he purchased each and all of said bonds before maturity, for a valuable consideration. Plaintiff says that said bond, Exhibit 'A,' and each of said other bonds, is past due wholly unpaid; WHEREFORE plaintiff prays judgment for twenty thousand dollars against said defendant, and for all proper relief."

7 This complaint also contained a count, with similar allegations, upon coupons for interest, attached to such bonds at the time of their execution, annexing the form as Exhibit B. A stipulation similar to those before made was annexed.

The defendant demurred to this complaint because among other things (1) it was insufficient in law; (2) it "does not allege under what law or for what purpose the bonds and coupons sued on were issued;" (3) it "contains no allegation showing authority in defendant to make the bonds and coupons sued
8 upon;" and (4) "the allegation of power and authority in the defendant to make the bonds and coupons in suit is a legal conclusion. Lastly, insufficiency of facts to constitute a cause of action.

The Circuit Court sustained the demurrer and gave judgment for defendant.

Plaintiff brought error.

The Supreme Court affirmed the judgment.

9 GRAY, J. The town of Covington had no general power to issue negotiable bonds. If the general statute of Indiana of June 11, 1852, under which it was incorporated, conferred any power upon towns to issue bonds, it was only for certain municipal purposes therein specified; and the general statute of May 15, 1869, authorized towns to issue bonds for the purchase and erection of lands and buildings for school purposes only. 1 *Gavin & Hord's Stat.*, 623-626; *Davis' Suppl.*, 116.

The bonds in suit containing no statement of the purpose for which they were issued, and no recital which can bind the town

by way of estoppel, anyone suing upon the bonds is bound to 10
allege and prove the authority of the town to issue them.*

The plaintiff relies on the statement of Mr. Justice SWAYNE in
Gelpcke v. Dubuque, 1 Wall., 175, 203, repeated by him and
by Mr. Justice CLIFFORD in later cases, that "when a corporation
has power, under any circumstances, to issue negotiable securi-
ties, the bona fide holder has a right to presume they were is-
sued under the circumstances which give the requisite authority,
and they are no more liable to be impeached for any infirmity
in the hands of such a holder than any other commercial paper,"
Supervisors v. Schenck, 5 Wall., 772, 784; Lexington v. Butler,¹¹
14 Wall., 282, 296; San Antonio v. Mehaffy, 96 U. S., 312, 314;
Macon County v. Shores, 97 U. S., 272, 279.

But the circumstances thus spoken of were the preliminary
facts requisite to the exercise of the power, not the limits, fixed
by law, of the objects and purposes for which the power could be
exercised at all. In each of the cases cited, the defects sug-
gested were in the requisite preliminary proceedings, and the
bonds sued on appeared by recitals on their face to have been
issued according to law. When the law confers no authority 12
to issue the bonds in question, the mere fact of their issue can-
not bind the town to pay them, even to a purchaser before
maturity and for value. Marsh v. Fulton County, 10 Wall.,
676; East Oakland v. Skinner, 94 U. S., 255; Buchanan v.
Litchfield, 102 U. S., 278; Dixon County v. Field, 111 U. S.,
83; Hayes v. Holly Springs, 114 U. S., 120; Daviess County
v. Dickenson, 117 U. S., 657.

A demurrer admits only facts, and facts well pleaded. The
town having but a limited authority to issue bonds for certain
purposes, it is not enough for the plaintiff to aver in general 13
terms that the town was authorized to issue the bonds in suit;
but he must state the facts which bring the case within the
special authority. There is nothing in this declaration, or in the
copies of instruments annexed to and made a part of it, which
shows, or has any tendency to show, for what purpose the
bonds were made. The averment, that the defendant is a

* By later decisions, recitals in the bond are not enough to raise an es-
toppel. Sutliff v. Lake Co. Comrs., 147 U. S., 230 and cas. cit.

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- 14 municipal corporation under the laws of Indiana, "with full power and authority, pursuant to the laws of said state, to execute negotiable commercial paper," if understood as alleging a general power to execute negotiable commercial paper is inconsistent with the public laws of the state, of which the courts of the United States take judicial notice. The averment, that the bonds held by the plaintiff were executed pursuant to the laws of the state, is but a statement of a conclusion of law, which is not admitted by demurrer. The declaration is fatally defective for not stating the facts necessary to enable the court to judge
- 15 for itself whether that conclusion of law has any foundation in fact. *Pumpelly v. Green Bay Co.*, 13 Wall., 166, 175; *Oragin v. Lovell*, 109 U. S., 194; *Kennard v. Cass County*, 3 Dillon, 147; *Broome v. Taylor*, 76 N. Y., 564; *Cotton v. New Providence*, 18 Vroom, 401.

Judgment affirmed.

MILLIKEN v. WESTERN UNION TEL. CO.

New York Court of Appeals, 1888.

[Reported in 110 N. Y., 403; rev'g 53 Super. Ct. (J. & S.) 111.]

1. A complaint is not demurrable merely because the facts demurred to are imperfectly or informally or argumentatively stated.
2. Upon demurrer the question is upon the sufficiency of the facts which may fairly be collected from the pleading demurred to, considered together with whatever inferences may fairly be drawn from them.
3. A complaint against an ocean telegraph company, after alleging that plaintiff had sent by it a message to his agent in France, alleged that plaintiff, when expecting an answer by cable to the message he had previously sent, inquired at defendant's office and was told that no answer had been received, although it had been received; and that defendant, according to its usual custom, registered his address and promised to forward an answer if or when received, and defendant declined to receive payment therefor in advance, though offered by plaintiff; and failed to forward an answer which was actually received.—*Held*, that it stated a good cause of action, either upon the contract made by defendant with plaintiff's agent in France, or upon its contract with plaintiff in New York.
4. The rule that a principal may maintain an action upon a parol contract made by his agent with a third person, although the agency is not

disclosed at the time of making the contract, applies in actions against telegraph companies.

5. The law will generally imply a promise to pay, where one person has rendered valuable services to another at his request.

Action on contract for failure to deliver a telegraphic message. 1

The allegations of the complaint were :

I. That plaintiff was at all the times hereinafter mentioned, and still is a dramatic writer, translator and dealer and broker in American and foreign plays.

II. Upon information and belief that the Western Union Telegraph Company, the above named defendant, is a domestic corporation duly existing under and by virtue of the laws of the state of New York. 2

III. That the principal business of defendant is to receive and transmit messages by telegraph over certain lines of wire running through the state of New York and into and through certain states and counties contiguous thereto, and to deliver the same and to receive, transmit and deliver messages from abroad transmitted by submarine telegraph cables in connection with its lines of wire and proper facilities operated by it for that purpose ; and the confidence with which the public is invited to and does repose in the care with which defendant conducts its said business is a source of large profit and gain to said defendant. 3

IV. And the said defendant held out and represented to the world and to this plaintiff, that it would conduct its said business with reasonable care, diligence and dispatch, and that it would transmit, receive and deliver telegraphic and cable messages in as diligent, competent and correct manner with all convenient speed. 4

V. And plaintiff, relying upon said inducements and representations, entered into a contract with said defendant, as hereinafter set forth.

VI. That plaintiff on the 15th day of December, 1883, was applied to by a person who then desired to purchase from plaintiff a certain French play or dramatic composition entitled "Pot Bouille," owned by parties in the city of Paris, in the republic of France, and then being produced and exhibited in that city ;

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- 5 and said applicant was then willing to pay plaintiff for said play the sum of \$3,000, but plaintiff was, at the time said application was made to him, ignorant of the facts as to whether he could purchase said play, and the price he would be required to pay therefor; and in order to ascertain said facts plaintiff did on said 15th day of December, 1883, send a cable message to Thomas Linn, plaintiff's agent in Paris, which said message was as follows, to wit: "What is the lowest price at which you can buy 'Pot Bouille'?" And said Linn received said message promptly and forwarded a reply to plaintiff, addressed "Mentor, 6 New York," which said reply plaintiff subsequently learned was received by defendant, and was in defendant's possession on the 17th day of December, 1883.

That plaintiff called at defendant's office on said 17th day of December, 1883, and inquired if defendant had received a message addressed "Mentor, New York;" and plaintiff was informed by defendant that it had not received such message, but said defendant then represented and stated to plaintiff that any message sent by cable from Paris to New York would be received by and through defendant in New York; but said defendant did not then, nor at any time thereafter, deliver said 7 message to plaintiff, although plaintiff alleges upon information and belief that said message, directed as aforesaid, was then in the possession and custody of defendant.

Plaintiff further says that on said 17th day of December, 1883, he requested defendant to register the name and address of plaintiff in order that said message might be promptly delivered to plaintiff, and defendant then and there, pursuant to its custom and in the regular course of its business, did register the 8 name and address of plaintiff in a book kept by defendant for such purpose, as follows, to wit.: "Mentor, New York, James F. Milliken, No. 19 West Twenty-fourth street, New York City;" and plaintiff then informed defendant that he was expecting a message from Paris, addressed "Mentor, New York," and that he believed said message had been sent and should be in the possession and custody of defendant; and that said message was of great importance to plaintiff, and involved a transaction with regard to the sale of a play by plaintiff, and said trans-

action involved a large sum of money; and that plaintiff could 9
do nothing with regard to it until he had received said message;
and defendant then and there promised and agreed to and with
the plaintiff that defendant would send such message, without
delay, to plaintiff, at No. 19 West Twenty-fourth street, in said
city of New York, if said message had been received or should
be received by defendant; and defendant held out and repre-
sented to plaintiff, as hereinbefore set forth, that defendant
would deliver said message to plaintiff safely, promptly and with
diligence and dispatch; and plaintiff, relying upon said repre-
sentations and inducements, and reposing confidence in the care 10
with which defendant conducted its said business, as aforesaid,
did then and there contract and agree with defendant for the
delivery of said message by defendant to plaintiff, and said de-
fendant undertook and agreed to and with this plaintiff to de-
liver said message to plaintiff at No. 19 West Twenty-fourth
street, in the city of New York, safely, promptly and with dili-
gence and dispatch; and plaintiff then offered to pay and reward
said defendant in advance for said service and for registering
plaintiff's name and address, but said defendant then declined to 11
receive or accept pay or reward.

VII. That defendant received said message and reply, ad-
dressed "Mentor, New York," prior to the 19th day of Decem-
ber, 1883, as plaintiff is informed and believes, but said defend-
ant, not regarding its said promise and undertaking, and well
knowing the importance of said message, did not take due care
to deliver said message to plaintiff, as agreed, although thereafter
frequently solicited and requested to do so by plaintiff; and did
not then deliver said message to plaintiff, nor at any time after-
wards, but, on the contrary, the defendant so negligently and 12
carelessly conducted itself with respect to said message and the
delivery thereof that, by and through the mere carelessness,
negligence and improper conduct of the defendant, its servants
and employees said message was never delivered to plaintiff, and
is still in the possession and custody of defendant; and by reason
of the premises in that behalf, and in consequence of the negli-
gence of defendant as aforesaid, and not through any negligence
or fault of this plaintiff, plaintiff lost the sale of said play, and

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13 suffered thereby loss and damage in a large sum of money, to wit, in the sum of \$1,400; and plaintiff alleges that he has since ascertained the fact to be that said message contained information that plaintiff could purchase and secure said play at a price not to exceed 8,000 francs; and plaintiff alleges that if defendant had delivered said message to plaintiff, as agreed, plaintiff would have sold said play for \$3,000, and would have realized thereby a profit of not less than \$1,400.

14 WHEREFORE plaintiff demands judgment against defendant for \$1,400 with interest from January 1, 1884, besides the costs of this action.

Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The Superior Court at Special Term sustained the demurrer, holding that there was no contract shown, nor any privity of contract, nor any consideration moving to the defendant sufficient to support an action.

15 *The General Term* affirmed the judgment, on the view that the averments of the complaint did not show that the so-called contract was supported by any consideration; that it was not averred that the promise to deliver the message was made in consideration of the reward or the promise to pay a reward. Nor did the complaint aver a legal duty upon defendant, either in general or to the plaintiff particularly, to deliver the message upon which an implied contract to do the duty would arise.

The Court of Appeals reversed the judgment.

16 RUGER, Ch. J. The questions involved in this appeal are raised by a demurrer to the complaint, alleging that it does not state facts sufficient to constitute a cause of action.

Both the Special and General Terms sustained the demurrer, and ordered judgment for the defendant. We are of the opinion, however, that the complaint does state a cause of action.

It must be assumed at the outset that the facts stated therein, as well as such as may by reasonable and fair intendment be implied from the allegations made, are true. It is not sufficient, to sustain a demurrer, to show that the facts are imperfectly

or informally averred, or that the pleading lacks definiteness and 17 precision, or that the material facts are argumentatively stated. (Lorillard v. Clyde, 86 N. Y., 384; Marie v. Garrison, 83 *id.*, 14.) If, from the facts stated, it appears that the defendant incurred a liability to the plaintiff, whether arising upon contract or from an omission to perform some legal duty or obligation resting upon it, the complaint should be sustained, whether the plaintiff has set forth the legal inferences which may be implied from the facts stated, or not. (White v. Madison, 26 N.Y., 117.) The present system of pleading does not require that the conclusions 18 of law should be set forth in the pleading, provided that the court can see, from any point of view, from the facts stated that a legal obligation rested upon the defendant. (Eno v. Woodworth, 4 N. Y., 249.)

The inquiries in this case are, first, whether the defendant was competent to enter into the contract alleged by the complaint to have been made; and, secondly, whether a valid contract was made between it and the plaintiff to do or perform the service undertaken by it.

The first question may be briefly disposed of, as no point is 19 made as to the competency of the defendant to contract to deliver telegraphic messages to persons addressed; and the sole inquiry is, therefore, whether the complaint shows that it has made a valid contract to do so.

The demurrer concedes that an agreement was made by which the defendant promised to deliver a message expected to be received by it from the plaintiff's agent in Paris, addressed "Mentor, New York," to the plaintiff, at his residence, as soon as the same should come into its possession.

The facts alleged show that the plaintiff had made arrange- 20 ment with his agent in Paris to obtain information upon business in which the plaintiff was solely interested, and transmit it by telegraph to New York to the address of "Mentor." It also appears that the message was really intended for the plaintiff, and that it was duly received by the defendant, but was not delivered by it.

The sole claim of the defendant, therefore, is reduced to the contention that the complaint does not show a good or sufficient

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21 consideration for its promise to deliver such message, and that no legal duty rested upon it to deliver the same to the plaintiff. We think that this complaint, under the rules of law applicable to questions raised by demurrers, does state a cause of action on the part of the plaintiff against the defendant. We can see no reason why the defendant is not liable to the plaintiff upon the contract made by it with his agent in Paris for the transmission and delivery of the message. So far as appears, the plaintiff was the only party interested in the business to which the message related, and the only person who could be benefited by the performance of that contract. It is quite obvious, from the averments in the complaint, that the defendant secured possession of the message under a contract to transmit and deliver it to the person answering the description of its address, in New York. (Baldwin v. U. S. Tel. Co., 1 Lans., 125; Leonard v. N. Y., etc., Tel. Co., 41 N. Y., 544.) If the defendant had been unable, by reason of the fictitious address, to identify the person for whom it was intended; it would have been a sufficient excuse for its non-delivery, but this difficulty was obviated before the duty
22 of delivery fell upon the carrier, by the information, given to, and accepted by it, as satisfactory evidence of the identity of the person for whom it was intended. The rule that a principal is entitled to maintain an action upon a contract made by his agent with a third person, although the agency is not disclosed at the time of making the contract, has many illustrations in the reported cases, and is elementary law. (Coleman v. Bank of Elmira, 53 N. Y., 388; Briggs v. Partridge, 64 *id.*, 357; Ford v. Williams, 21 How. [U. S.], 288; Dykers v. Townsend, 24 N. Y., 57.) This principle has been frequently applied in
24 actions against telegraph companies, and is now the settled law of this country in respect to such corporations. (De Rutte v. N. Y., Albany and Buffalo E. M. Tel. Co., 1 Daly, 547; Leonard v. Tel. Co., 41 N. Y., 544; N. Y. & W. P. Tel. Co. v. Dryburg, 35 Pa., 300; Baldwin v. Tel. Co., 1 Lans., 128.)

In Leonard v. Telegraph Company an action was sustained on account of a change made in the language of a telegram passing between two of the plaintiff's agents, by which a loss was inflicted upon their common principal. In Playford v. United

Kingdom Electric Telegraph Company (L. R., 4 Q. B., 706), in 25 an action brought by the person receiving the message against the telegraph company for having negligently changed the terms of the dispatch, in course of transmission, whereby the plaintiff suffered damage by acting upon it as received, it was held that the company was under no contract obligation to the plaintiff to deliver the message correctly, but it was conceded if the senders had been the agents of the plaintiff in the business to which the message related, that a recovery could have been had. Some of the authorities in this country go still further 26 and hold that a telegraph company rests under a legal duty to the person to whom a message is addressed, when he is the party solely interested, to transmit it correctly and deliver it to him; but it is unnecessary in this case to pass upon that question, and we, therefore, express no opinion upon it. (*De Rutte v. Tel. Co.*, *supra*; *Wadsworth v. W. U. Tel. Co.*, 38 Alb. L. Jour., 87.)

We are, therefore, of the opinion that the plaintiff could avail himself of the obligation of the original contract for the transmission of the message, and recover, for a breach thereof, 27 such damages as he might be able to show he had suffered from the alleged breach. We are also of the opinion that, aside from the contract referred to, the complaint states a valid contract between the plaintiff and defendant, made at New York in anticipation of the arrival of the message at that place. It alleges that the plaintiff stated to the defendant that he was expecting a message from Paris addressed "Mentor, New York," and was the individual intended by such address, and requested the defendant to deliver it to him at his residence in that city. The plaintiff then offered to pay for such service in advance, 28 which the defendant declined to accept, but entered plaintiff's name in its register as that of a person entitled to receive messages addressed to "Mentor," and promised to deliver such message, in accordance with such request, at plaintiff's residence when received by it. That this was a service which the defendant was authorized to contract to perform is obvious from the usual course of telegraphic business and the necessities of the case. The fact that defendant had contracted with another per-

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29 son to transmit and deliver the same message, especially as it claims that it did not thereby come under any legal duty to the plaintiff to seek him out and deliver the message, would not preclude it from making a contract with the person addressed, for a special mode of delivery to him. If the plaintiff, intending to go to a distant city, had contracted with defendant to repeat such message to him there, could there be a doubt as to the validity of such a contract? And we think it equally within the contractual power of a telegraph company to agree to such special
30 delivery, either without or within the limits of its usual delivery, with the person expecting to receive a particular message. It is said, however, that there is no consideration alleged for this promise.

If it can fairly be inferred from the facts alleged that the parties expected compensation to be made for the services promised, and the payment of such agreed compensation could be enforced by the promise, a sufficient consideration appears for the undertaking. There is no doubt but that reciprocal promises are a valuable consideration for each other, and that the law will
31 usually imply a promise to pay for valuable services rendered to a party upon his request. (Pollock on Cont., 161; Coleman v. Eyre, 45 N. Y., 38; Briggs v. Tillotson, 8 Johns., 304.) That it was expected by the parties that the plaintiff should pay for the delivery of the message is obvious from his offer to do so in advance, and although this was waived by the defendant that did not preclude it from demanding and enforcing the collection of payment for services performed by it in pursuance of plaintiff's request. If the complaint had, in terms, alleged a promise to pay for such services, this would have authorized a finding of
32 such promise upon proof of the facts stated in the complaint; and we think that, upon demurrer, the law will imply such a promise, and that the complaint must, therefore, be held to have alleged a good cause of action. (Marie v. Garrison, *supra*; Eno v. Woodworth, *supra*; Justice v. Lang, 52 N. Y., 323.) For the reasons stated we think the demurrer should have been overruled.

The judgments of the courts below are, therefore, reversed, and the demurrer overruled, and the defendant have leave to

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answer the complaint upon payment of all costs and disburse- 33
ments accruing since the demurrer was interposed.

All the judges concurred; EARL, J., on second ground stated
in opinion.

Judgment reversed.

CATLIN v. ADIRONDACK COMPANY.

New York Court of Appeals, 1880.

[Reported in 11 Abb. N. C., 377.]

1. The liability of a common carrier for the non-delivery of goods may be enforced by an action in either of the forms formerly known as assumpsit or tort, at the option of the pleader. ✓
2. Where the summons was in the form of an action for money on a contract, and the complaint alleged that the defendant's business was to carry goods for hire, the delivery of goods to defendant, payment of charges, the undertaking of defendant to deliver, and the loss of goods of the amount claimed, with interest,—*Held*, that the action was upon contract.
3. An action against a common carrier for the non-delivery of goods, in the form of an action on contract, is not an action for an "injury to property" within Code Civ. Pro., § 549, so as to warrant an execution against the person.

Plaintiff sued defendant to recover for goods taken from 1
plaintiff's trunks, while in defendant's custody for the purpose
of transportation.

The allegations of the complaint were as follows: "That, at the several times hereinafter mentioned, the defendant was a corporation, duly created and existing under the laws of the state of New York, and engaged in carrying goods for hire. That on or about the twenty-second day of November, 1872, the plaintiffs delivered to and left in the possession of the defendant, at the station of Hadley, in Saratoga county, New York, three trunks, to be conveyed as freight to Rye, Westchester county, New York. 2

"That the defendant undertook and became responsible to the plaintiffs for the due and safe transport of said trunks to their said destination. That said trunks were unduly delayed in transportation, to the great annoyance and inconvenience of the

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3 plaintiffs, and were not delivered at their said destination at Rye till on or about the ninth day of December, 1872, having thus been about eighteen days in transportation, that should not have occupied more than four or five days at the very most. That after said trunks had been received by the plaintiffs at their destination aforesaid, and the charges for their transportation duly paid, it was found that each and every one of said three trunks had been broken open since their delivery to the defendant, and while said defendant was responsible to the plaintiffs for their safety, and numerous articles, of the aggregate value
4 of \$400, unlawfully taken therefrom. Wherefore," etc.

The plaintiffs first recovered judgment. It was afterwards reversed on appeal. On a new trial the complaint was dismissed, and defendant entered judgment for costs. An execution against the property of plaintiff being returned unsatisfied, an execution was issued against his person. The plaintiff was arrested and held in custody until he paid the money to the sheriff.

At Special Term, POTTER, J., granted an order vacating the
5 execution against the person, and directing the sheriff to return the money collected under it, for the reasons stated in his opinion given below.

The General Term of the Supreme Court held that this complaint was not on contract, but in tort; and reversed the order.

Other facts appear in the opinion of POTTER, J.

The Court of Appeals unanimously reversed the decision of the General Term, and adopted the opinion of the Special Term, which was as follows :

6 POTTER, J. This is a motion to set aside an execution issued against the person of plaintiff, upon a judgment against him by defendant for the costs of this action, upon the ground that the gravamen of the complaint is a breach of contract, and not a tort.

The liability of a common carrier for the non-delivery of goods intrusted to him for carriage may be enforced by an action in either of the forms formerly known as assumpsit or tort, at the option of the pleader.

The rules of liability and defence were the same in each. If 7
the pleader chose to predicate it upon contract, he would allege
a contract, the consideration, and the breach or non-fulfillment
of it.

If he chose to predicate it upon tort, he would allege the
custom of the realm, the loss by conversion, etc. Certain inci-
dents are peculiar to each form of action. In the former was to
be observed the same rule as to joinder of parties as in other
actions upon contract. In the latter the same rules in that re-
spect applied as to actions for tort.

So, too, since the act to abolish imprisonment for debt and the 8
adoption of the Codes, there has been a distinction in the execu-
tions issuable in the different forms of action.

In the former, execution can only issue against the property.
In the latter, it may issue against the person of the party.
Whether this action belongs to one or the other of these classes
depends upon the form of the summons, and especially upon the
allegations in the complaint. The evidence upon the trial is not
before me on this motion.

The summons is in the form prescribed in an action for money 9
upon contract. The complaint alleges that the defendant was
engaged in carrying goods for hire, the delivery to defendant of
certain trunks by the plaintiff, to be conveyed to Rye. That de-
fendant *undertook* for the safe transport of said trunks to their
destination. That the charges for their transportation were duly
paid. While in defendant's possession, and while they were re-
sponsible for the safety of said trunks, articles of the value of
\$400 were taken therefrom, and a demand for judgment for that
sum, with interest thereon from the time the trunks and their
contents were delivered to and received by defendant. 10

These are essential allegations of an action upon contract, and
in an action upon tort the essential allegations of the complaint
are that defendant was a common carrier, the custom appertain-
ing thereto, and his duty as such, the loss of goods through de-
fendant's negligence or conversion, and the damages sustained
by plaintiff by reason of the loss of his goods. These allegations
are wanting in the complaint in this case.

On the contrary, the gist of the action is the non-fulfillment of

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- 11 the undertaking or contract to carry and deliver safely, as alleged in the complaint.

My conclusion is, that the action is upon contract, and as no order of arrest has been obtained, for any matters incident to or *extrinsic* to the contract, neither party to it (if the defendants are not a corporation) can be arrested upon execution issued in it. I think these views are supported by *Bank of Orange v. Brown*, 3 Wend., 158; *Campbell v. Perkins*, 8 N. Y., 430; *Brown v. Treat*, 1 Hill, 225.

Motion to set aside execution granted.

DALZELL v. THE FAHYS WATCH CASE CO.

New York Court of Appeals, 1893.

[Reported in 138 N. Y., 285.]

1. Allegations of a pleading are to be liberally construed with a view to substantial justice between the parties.
 2. A complaint *held* good as against demurrer, which specified certain letters patent issued to plaintiff, averred that those patents were the same mentioned in an agreement annexed; that under such agreement plaintiff duly assigned to defendant, or for its use, and at its request, the said patents; that defendant, under said patents and agreement, had made and sold large quantities of the articles covered thereby; that defendant had received net profits amounting to a specified sum, that plaintiff has demanded his half thereof, but that defendant has refused to pay that share to him.
- 1 Action for a share of net profits realized from the manufacture and sale of patented articles.
- The allegations of the complaint were as follows:
- I. On information and belief that at all the times hereinafter mentioned the defendant was and still is a corporation duly created, organized and existing under the laws of the State of New York.
- II. That heretofore there were issued, in due form of law,
 2 unto this plaintiff by the United States of America five several Letters Patent, as follows: [*Specifying them by numbers and date of issue.*] And being the same Letters Patent mentioned

in the contract duly made, executed and delivered interchangeably between the parties hereto, a copy of said agreement being hereunto annexed and made a part hereof. 3

That thereafter and under and by virtue of said annexed contract in that behalf, this plaintiff did, on or about December 27, 1887, duly assign, transfer and set over unto the defendant, or for its use, and at its request, the Letters Patent aforesaid.

That thereafter and ever since, the defendant, as plaintiff is informed, verily believes and alleges, has manufactured and sold under said Letters Patent and contract, upwards of one million two hundred and fifty thousand of the commodities thereby covered and referred to, and that after all the deductions authorized by said agreement from the proceeds of such sales, there remains received by defendant and being net profits, the sum of one hundred and fifty thousand dollars. 4

That plaintiff has duly and fully done and performed all the matters and things by him to be done and performed under said contract on his part, and from said defendant demanded his said moiety of net profits thereunder accordingly, but the defendant has refused to pay over said moiety nor account thereof, to plaintiff's damage seventy-five thousand dollars. 5

WHEREFORE plaintiff demands judgment against defendant for seventy-five thousand dollars, besides the costs and disbursements of this action.

The annexed contract recited that Dalzell had obtained a number of Letters Patent for improvements in watch cases, in which the company was desirous of securing an interest, and contained an agreement on the part of Dalzell to assign to the company all his interest in all inventions and Letters Patent obtained thereon, now had, or thereafter acquired by future inventions and patents relating to the company's business, "provided the said Fahys Watch Case Company may desire to manufacture under said Letters Patent, and shall require in writing the said Dalzell so to assign said patent or patents." In consideration, the company agreed to furnish all necessary capital and to divide net profits "arising from the sale of the said goods so manufactured under patents aforesaid after deducting 6

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- 7 all costs and expenses, including cost of manufacture, selling, bad debts, etc."

Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

- The Special Term of the Superior Court* sustained the demurrer on the grounds: (1) That the complaint failed to show performance on plaintiff's part of the conditions precedent under the agreement, of assigning the *inventions* as well as
8 patents on request. (2) That there was no sufficient allegation that plaintiff had assigned *all* the letters patent he had procured. (3) That the allegation of an assignment "to defendant, or for its use and at its request" was not a compliance with the agreement to assign "to the Fahys Watch Case Company," and the statement that "it was under and by virtue of said annexed contract" is contradicted by the face of that contract. It was further held that the general allegations of performance of conditions precedent are not to be deemed to embrace matters as to which plaintiff has specifically pleaded.

9

The General Term of the Superior Court affirmed the judgment on the opinion of the Special Term.

The Court of Appeals reversed the judgment.

- EARL, J. The complaint is clearly sufficient. It contains a plain and precise statement of facts constituting the plaintiff's cause of action. It specifies five patents which were issued to him at the dates mentioned, and avers that those patents are the same that are mentioned in the contract annexed to the com-
10 plaint; that under the contract the plaintiff did at a date mentioned duly assign, transfer and set over to the defendant, or for its use and at its request, the patents mentioned; that it has manufactured and sold under the patents and contract a large quantity of the commodities covered by and referred to in the patents; and that after all the deductions authorized by the contract, there remained net profits received by it amounting to the sum of \$150,000; that he has demanded his half of such net profits; that it has refused to pay that share to him, and he

demands judgment. So far as we can perceive this complaint is 11 absolutely unassailable. It is quite true as contended by the defendant that the plaintiff was bound to assign to it not only the letters patent, but all the inventions. We may assume that the plaintiff has not assigned the inventions, but we cannot assume that he has refused to do so. The averment in the complaint is that upon the request of the defendant he assigned the patents, and that it has used them and made the net profits by the use of them. It has, therefore, had the substantial benefit of the agreement thus far. If the plaintiff's assignment was not 12 as full and complete as it was entitled to have, it should have refused to accept it, or to use the patents, and then it could have compelled him to perform his contract, or have sued him for damages. But having taken an assignment of the patents under the agreement, and used them, it cannot refuse to pay the share of the profits stipulated in the contract. If it now wishes an assignment of the inventions, it must demand it, and if refused, it may compel the assignment by suit or recover damages for the refusal; or it may retransfer the patents to the plaintiff and refuse further to use them. But it cannot retain the patents 13 and use them without any liability to pay the stipulated compensation for their use. So, too, if the defendant has suffered any damages because the plaintiff has refused to assign the inventions it may interpose a counterclaim for such damages in this action.

The agreement requires the plaintiff to assign the patents to the defendant, and it is claimed that the complaint is defective because it alleges that he assigned, transferred and set over the patents "to the defendant, or for its use." But it is alleged that the assignment was thus made at its request. It certainly 14 would be a performance of the contract on the part of the plaintiff if, at the request of the defendant, it assigned the patents to some person for its use, and it thereafter used them and had the benefit of them. It is quite hypercritical to say that the letters patent mentioned in the complaint are not those referred to and contemplated by the contract. It is alleged that they were issued to the plaintiff; that they are the same letters patent mentioned in the contract; that the patents were assigned

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15 to the defendant at its request in pursuance of the contract, and that it used them. What further allegations were needed?

This complaint cannot be condemned as insufficient without applying rules for its construction more stringent than have ever prevailed in this state, in despite of a provision of the Code (§ 519), which requires the allegations of pleadings to be liberally construed, with a view to substantial justice between the parties.

The judgment of the General and Special Terms should be reversed and judgment given for the plaintiff upon the
16 demurrer, with costs, with leave, however, to the defendant, within twenty days after the filing of the remittitur in the court below, upon payment of all the costs subsequent to the demurrer, to answer the complaint.

All the judges concurred.

Judgment reversed.

THOMAS v. NELSON.

New York Court of Appeals, 1877.

[Reported in 69 N. Y., 118.]

1. The allegations of the complaint implied a written lease for seven years.—*Held*, no error to allow proof of a parol lease for such term, and subsequently to allow the complaint to be amended so as to aver a parol letting.
 2. *It seems*, that under the complaint as originally framed, an oral lease could have been proved; that the variance would be immaterial.
 3. *It seems*, that an oral lease for more than one year, declared to be void by the Statute of Frauds, is entirely void; yet if the tenant enters under it and occupies, he may be compelled to pay for the use and occupation of the premises.
- 1 Action to recover rent under a lease.

The allegations of the complaint were as follows:

That in the month of March, 1873, he [*plaintiff*] leased to the defendant, Charles Nelson, the premises, known as No. 271 Broadway, in the city of Brooklyn, for the term of seven years, from the first day of May, 1873, at the rent of fourteen hundred dollars per annum for the first three years, and fifteen hundred dollars per annum for the last four years of said term; said rent

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to be in equal monthly payments; that said defendant on or 2
before said first day of May, 1873, entered into possession and
occupation of said premises, in pursuance of said letting and
renting; said defendant has not paid the rent for the said
premises which became due and payable on the first day of
June, July, August, September, October, November and Decem-
ber, 1873, and on the first days of January, February, March
and April, 1874, amounting in all to the sum of one thousand
two hundred and eighty-three dollars and twenty-six cents.

That said plaintiff on or about the first day of September, 3
1873, duly assigned and transferred all his claim and demand
for the rent for the months of May and June, to Joseph Maujer
of said city, who has re-assigned the same to him, who is now
the lawful owner thereof.

Wherefore, etc.

• *At Trial Term* plaintiff had a verdict.

The General Term of the City Court of Brooklyn affirmed
the judgment.

The Court of Appeals affirmed the judgment. 4

EARL, J. This was an action to recover rent for the occupancy
of certain premises situated in the city of Brooklyn, under an
alleged lease from plaintiff to defendant. The plaintiff re-
covered, and the defendant seeks upon this appeal to reverse
his judgment upon several grounds, which I will examine
separately.

First. In his complaint the plaintiff alleges a leasing for the
term of seven years. On the trial he proved the following
memorandum, signed by himself: "I am to give Mr. Nelson a 5
lease of building 271 Broadway for seven years, first three years
at \$1,400 per year, and four years at \$1,500 per year." This
memorandum does not embody the contract between the parties,
and was not intended to. It simply embraces the main features
of the lease, and plainly indicates that a formal lease was
subsequently to be executed, embodying the agreement which the
parties had made. The allegations of the complaint were such
as to imply a valid written lease for seven years, and, hence, when

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6 the plaintiff, upon the trial, attempted to show the parol agreement for a lease for seven years, the defendant objected that such a lease was not alleged, but the court permitted the plaintiff to prove the parol lease, saying, if necessary, that he would allow an amendment of the complaint. After the verdict the defendant made a motion upon the minutes of the court for a new trial. Plaintiff was permitted to enter judgment and his other proceedings were stayed and the hearing of the motion was adjourned for about a month, when it was heard and denied; and the court then made an order allowing the complaint to be amended by averring a verbal letting for seven years. I am of opinion that under the complaint as originally framed, a verbal lease for seven years or for one year could have been proved. It would have been merely a case of immaterial variance, which could not have misled the defendant. But even if this were not so, the subsequent allowance of the amendment at Special Term was proper. The facts being then all out and before the court, it could allow an amendment to conform the pleadings to the proof.

8 Second. As the written memorandum was not of itself the contract between the parties, the plaintiff had the right to prove it by parol, and, in doing so, violated none of the rules of evidence as to written agreements. He proved a parol letting for seven years. The statutes require that such a lease shall be in writing. The court ruled upon the trial, and in its charge to the jury, that such a lease, although invalid for the term of seven years, was valid for the term of one year; and to these rulings there was no exception. Hence the error, if any, cannot be complained of here. The statute (2 R. S., 135, § 8) declares

9 that a parol contract for leasing land for a longer period than one year shall be void. While such a contract is void, yet, if the tenant enters under it and occupies, he may be compelled to pay for the use and occupation of the premises. (*Schuyler v. Leggett*, 2 Cow., 660; *People v. Rickert*, 8 *id.*, 226; *Anderson v. Prindle*, 23 Wend., 616; *Lounsbery v. Snyder*, 31 N. Y., 514; *Greton v. Smith*, 33 *id.*, 245; *Lockwood v. Lockwood*, 22 Conn. 425.) But it is difficult to perceive how such a contract, declared to be void by the statute, can be held to be valid for a

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single hour, or upon what principle a tenant, entering under a void lease, could be compelled, by virtue of the lease, to pay for a longer period than he actually occupied. The question as to the liability of the defendant for the rent for one year, could not be raised by the motion to non-suit, as he had occupied the premises for a portion of the year.

[*Rulings on an acceptance by plaintiff of a surrender of the premises, and defendant's right to abandon because of untenable condition, are here omitted.*]

Fifth. The plaintiff in his complaint alleged that he assigned the rent for the months of May and June to one Maujer, and that Maujer had re-assigned the rent to him. On the trial there was no proof of the assignment or re-assignment, and nothing was said about either until the judge had charged the jury, when the defendant's counsel requested him to charge that the plaintiff could not recover for these two months, which request was refused. In this there was no error. All the allegations on the subject in the complaint must be taken together, and they show plaintiff entitled to the rent. ¹¹

No other questions need consideration. Upon the assumption ¹² assented to at the trial that there was a lease binding for one year, no error was committed.

All the judges concurred.

Judgment affirmed.

HURLIMAN v. SECKENDORF.

City Court of Brooklyn, General Term, 1894.

[Reported in 9 Misc., 264.]

1. In an action to recover an instalment of rent under a lease providing for payment of rent in advance, defendants admitted making the lease and their refusal to pay the amount demanded, but denied that plaintiff had "duly performed all the conditions of the lease on his part," and that under the lease the specified sum had become due. *Held*, that all the material allegations of the complaint were admitted.
2. Where rent is due and payable in advance on the first day of a month, plaintiff's cause of action accrues and is complete on that day, notwithstanding he has covenanted to furnish his lessees with heat and power for that month.

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3. An allegation that "under and by virtue of said lease there became due on a specified day a specified sum," the rent for said month "constitutes" merely a conclusion of law, which defendants may disregard without affecting the real issues in the action.
4. The party who would fail if no evidence was given has the right to open and close.
5. The right to open and close is a substantial right, for the denial of which judgment must be reversed.

1 Action for rent.

The facts fully appear in the opinion.

- OSBORNE, J. Plaintiff brought this action to recover one month's rent of certain premises leased by him to defendants. Defendants, by their answer, admitted the lease, and set up sundry affirmative defenses and counterclaims, to which plaintiff replied, denying the same. Plaintiff obtained a verdict in his favor; and from the judgment entered thereon and the order
- 2 denying motion for a new trial, as well as from the exceptions taken on the trial, defendants take this appeal.

At the commencement of the trial the defendants claimed that they were entitled to the affirmative and to the right to open and close. Their motion in this regard was denied, and the defendants duly excepted.

- With a view of determining if this exception was well taken, it becomes our duty to examine the pleadings in this case, for the question as to which party is entitled to the affirmative must
- 3 be wholly determined by the pleadings. (*Ontario Bank v. Judson*, 123 N. Y., 279.)

The first paragraph of the complaint alleges the copartnership of the defendants.

- The second paragraph alleges "that the plaintiff heretofore, by an indenture made between him and the defendants, bearing date May 19, 1890, leased to the said defendants certain premises in said lease mentioned, to wit, the basement of the brick building situated on the northerly side of Wallabout street, near Lee
- 4 avenue, in the city of Brooklyn, and known as Nos. 171 to 187 Wallabout street, together with steam heating and power, as in said lease specified, for the term of twenty-three months, commencing on or about June 1, 1890, at the yearly rent of \$1,320,

payable monthly in advance on the first day of each and every month, which rent the said defendants covenanted and agreed to pay in manner as aforesaid." 5

Paragraph III. alleges "that the plaintiff has duly performed all the conditions of said lease on his part."

Paragraph IV. is "that under and by virtue of said lease there became due on September 1, 1890, the sum of \$110, the rent for said month, which the defendants have failed and refused to pay."

Then follows the prayer for judgment for \$110, with interest from September 1, 1890, besides the costs of this action. 6

By their answer, paragraph I., defendants "admit the allegations contained in paragraph I. of the complaint" (the copartnership of the defendants); "they admit making the lease in the complaint mentioned, a copy of which lease is hereto annexed and made part of this answer, and marked Schedule A, and they further admit that they refused to pay the amount demanded in the complaint." By paragraph II. "they deny each and every allegation in said complaint contained not hereinbefore specifically admitted." Then follow various affirmative defences, setting up that plaintiff failed to supply them with steam heat, power, etc., as he had covenanted to do, a rescinding of the lease, surrender, fraud and deceit in inducing them to make the lease, and claims for expenditures in fitting up the premises, loss of profits, etc. 7

Plaintiff's reply denied the matters constituting counterclaims. It will thus be seen that the defendants admitted their copartnership and the making of the lease in question, and their refusal to pay the amount demanded in the complaint; their denial of the other allegations mentioned in the complaint, "not hereinbefore admitted," can only refer to the remaining allegations of the complaint, to wit: "III. That the plaintiff has duly performed all the conditions of said lease on his part," and "that under and by virtue of said lease there became due on September 1, 1890, the sum of \$110, the rent for said month." 8

The last mentioned allegation constitutes merely a conclusion of law which it was unnecessary to insert in the complaint, and which the defendants could have disregarded without affecting the real issues in the action.

Hurliman v. Seckendorf, 9 Misc., 264.

9 Nor were the allegations in paragraph III. of the complaint essential to plaintiff's cause of action; they were not matters which plaintiff was bound to allege or prove, and the fact that they were denied by defendants did not have the effect of putting plaintiff to his proof on those points. (*Phillips v. Brown*, 20 Wkly. Dig., 155.) If it were necessary to go further to illustrate the statement that the allegation of performance of the conditions of the lease was not essential to plaintiff's cause of action, we have but to remember that the rent sued for was due and payable *in advance* on the first day of September for the
10 use of the leased premises for that month, and plaintiff's cause of action accrued and was complete on that day, notwithstanding that he had covenanted to furnish defendants with certain steam heat and power for their use during that month. Plaintiff's cause of action arose on the agreement to pay rent in advance, and he had a right to bring suit to recover the rent, if not paid on the first day of the month, regardless of anything he had agreed to do during that month. This being so, plaintiff's cause of action became complete immediately on default in payment,
11 and he was not called upon to allege, nor could he then truthfully allege, the performance of any conditions which remained for him yet to perform. That he did not commence suit till after the month had expired did not and could not affect the statement of his right of action that had already accrued.

It will thus be seen that no material allegation of the complaint was denied. The making of the lease was admitted, and the refusal to pay the amount demanded in the complaint. Plaintiff, in a such case, was not bound to prove occupation or enjoyment (*Gilhooley v. Washington*, 4 N. Y., 217; *Salmon v.*
12 *Smith*, 1 Saund., 202, 203, n. 1) or to give any proof.

The rule, well settled by abundance of authority, is that the party who would fail if no evidence were given shall open and close. (*Bailey Onus Probandi*, 607.) Applying that rule to the pleadings in this action, it will be seen that, if the defendants gave no evidence to support their affirmative defenses, it would be the duty of the trial court to direct a verdict for the plaintiff. The lease was admitted, and the covenant therein to pay rent monthly in advance, and the refusal to pay the September rent.

Coit v. Planer, 51 N. Y., 647.

These constituted all the essential facts on which plaintiff sought 13
to recover. The matters of defense set forth in the answer were
affirmative, and the burden was on the defendants to sustain
those defenses. (*Smith v. Sergeant*, 67 Barb., 243, 246.)

We are of the opinion that the affirmative was with the
defendants, and that the denial of their right to open and close
was the denial of a substantial right (*Conselyea v. Swift*, 102 N.
Y., 604), and that their exception was well taken.

This conclusion renders it unnecessary for us to examine any
of the other exceptions. 14

The judgment and order denying new trial should be reversed,
and new trial ordered, with costs to abide the event.

VAN WYCK, J., concurs.

Judgment and order reversed, and new trial ordered, with
costs to abide event.

COIT v. PLANER.

New York Court of Appeals, 1873.

[Reported, by memorandum only, in 51 N. Y., 647.]

1. To uphold the action for use and occupation, it is necessary that the actual or constructive relation of landlord and tenant should exist.
2. In an action for use and occupation the complaint alleged plaintiff's ownership of the premises, that he informed defendants that if they occupied the premises after a specified date the rent would be a specified sum, and that defendants continued their occupation; the defendants admitted these allegations. *Held*, that the facts clearly showed the conventional relation of landlord and tenant, and the law would imply that the defendants assented to the terms imposed and agreed to pay the rent named.
3. An assignment of a lease may be inferred from evidence that the alleged assignees took possession from the original lessees, and occupied the premises for the remainder of the term.

Action for use and occupation. 1

At the trial the defendant moved to dismiss the complaint because it did not state facts sufficient to constitute a cause of action. Motion denied; exception taken.

Plaintiff moved for judgment upon the pleadings. Motion granted; exception taken.

Coit v. Planer, 51 N. Y., 647.

- 2 Plaintiff had judgment for the amount demanded.

The General Term of the Superior Court affirmed the judgment, holding that all the facts were admitted which were required to make out plaintiff's case; that no issue was raised except the assignment, and as to that, it being averred in the complaint, and admitted, that defendants went into possession, an assignment *prima facie* was established.

The Court of Appeals affirmed the judgment.

- 3 EARL, J. Neither party upon the trial offered any proof. Both parties seem to have rested upon the pleadings, the defendants claiming that the complaint should be dismissed as not stating facts sufficient to constitute a cause of action, and the plaintiff claiming that he was entitled to judgment upon the facts admitted in the pleadings. The only question therefore, for us to consider is whether upon the pleadings, the plaintiff was entitled to the judgment which the court awarded him.

As to the rent which accrued subsequently to May 1, 1866, I do not see how the plaintiff's right can well be questioned.

- 4 The complaint alleged that the premises belonged to the plaintiff, and that he informed the defendants that if they occupied the premises after May 1, the rent would be four hundred dollars per year, payable quarterly, and the defendants continued their occupation. From these facts the law will imply that the defendants assented to the terms imposed and agreed to pay the rent named (*Despard v. Walbridge*, 15 N. Y., 374.) These facts clearly show the conventional relation of landlord and tenant which is held to be necessary to uphold the action for use and occupation. In the absence of anything showing
- 5 the duration of the prior lease it must be held to have terminated on the first of May as the statute in reference to leases in the City of New York gives it that termination*. (1

*1 R. S., 744 (4 *id.*, 8th ed., 2456), § 1.

"Agreements for the occupation of lands or tenements, in the city of New York, which shall not particularly specify the duration of such occupation, shall be deemed valid until the first day of May next after the possession under such agreement shall commence, and the rent under such agreement shall be payable at the usual quarter days for the payment of rent in the said city, unless otherwise expressed in the agreement."

R. S., 744.) The holding after that was upon the new lease 6
implied from the facts alleged.

Upon the facts alleged, prior to February 1, 1866, the relation of landlord and tenant existed as to the premises between the plaintiff and Planer & Kayser. They expressly agreed to pay him for the rent of the premises one hundred and fifty dollars quarterly, and they occupied under this agreement and paid the rent to February 1. It is then alleged that they assigned the lease to the defendants, who went into possession and occupied the premises thereafter during the remainder of the term. The assignment is denied, but the ownership, lease, 7
possession and occupancy are admitted. It is not denied by the counsel for the defendants that if the lease or balance of the term was assigned to them, they are liable for the rent in this action for use and occupation. The assignment put them in privity both of estate and contract with the lessor, and made them liable for the rent just as the original lessees were.

The defendants put in issue the assignment to them and hold it was necessary for the plaintiff to prove this to enable him to recover for the quarter's rent. This he could do by proving 8
directly the fact of assignment, or by showing facts from which it would be inferred. It has long been well settled that an assignment may be inferred by proof that the alleged assignees took the possession from the original lessees and occupied the premises for the remainder of the term. (*Armstrong v. Wheeler*, 9 Cowen, 88; *Bedford v. Leshum*, 30 N. Y., 453; *Quackenbos v. Clark*, 20 Wend., 555.) These facts are admitted in the pleadings and hence the plaintiff had nothing to prove to entitle him to recover. Under their denial, the defendants 9
could have given any competent proof that they did not take an assignment of the lease. But they offered no such proof and did not ask to give any. The rights of the parties on both sides seem to have been submitted to the court upon the pleadings. After the motion of the defendant to dismiss the complaint had been denied, plaintiff's counsel moved for judgment upon the pleadings, and the court granted the motion and defendants' counsel excepted. This is all the case shows took place at the trial. The decision of the court upon the pleadings was right,

Note on the Landlord's Remedies for Rent.

- 10 and whether it was or not is the only question raised by the exception. If the defendants had desired to prove anything, they should have offered their proof or expressed a desire to do so, and if the court had rejected the proof or ruled that no proof could be given, the defendants could have had an exception that might have been available.

The judgment must be affirmed, with costs.

All the judges concurred.

NOTE ON THE LANDLORD'S REMEDIES FOR RENT.

- 1 *Sealed lease.* If the rent is claimed by virtue of a sealed lease, the action should be on the instrument. *McKeon v. Whitney*, 3 Den., 452, and in New York this may be, even though the lease be for life. (1 R. S., 747 [4 *id.*, 8 ed., 2458] § 19.)

On a sealed lease the action must be in the name of the covenantor, even though he was a mere agent. (*Schaefer v. Henkel*, 7 Abb. N. C., 1; s. c. 75 N. Y., 378.)

- 2 *Unsealed written lease.* If the plaintiff relies on a written lease unsealed, he should sue on the instrument, unless he is prepared to prove use and occupation, in which case also he had better sue on the written lease, and allege occupation; he can then, even should proof of the writing fail, recover upon proof of such use and occupation. (*Thomas v. Nelson*, *supra*; *Prial v. Entwistle*, 10 Daly, 398.)

Several sums due on the same instrument, if due and payable before the action is commenced, constitute a single cause of action within the rule in *Secor v. Sturgis* (p. 5 of this vol.), and if any is omitted, a subsequent action therefor will be barred by the recovery of the part of such sums in the first action. (*Jex v. Jacob*, 19 Hun, 105; s. c. more fully 7 Abb. N. C., 452.) And the principle is the same, whichever action is commenced first.

- 3 *Oral letting*, if for a term not exceeding one year from the commencement of the term, is valid, though made before the commencement of the year. (*Young v. Dake*, 5 N. Y., 463). And an oral letting may be proved under an allegation of a written lease, unless defendant shows surprise, to his prejudice. (N. Y. Code Civ. Pro., § 539; s. p. *Bedford v. Terhune*, 30 N. Y., 453.)

Use and occupation. An action for the reasonable value of use and occupation lies where there was no sealed lease, and where the conventional relation of landlord and tenant existed; *i. e.*, an intention on the part of both to stand in that relation (*Preston v. Hawley*, 101 N. Y., 586),

Note on the Landlord's Remedies for Rent.

and the tenant actually occupied, and under circumstances that do not imply that the landlord intended the occupation to be free of rent. (*Coit v. Planer, supra.*) 4

Under a complaint for such use and occupation, plaintiff can prove an unsealed, but not a sealed lease, stipulating to pay the rent, and use it as evidence of the amount to be paid. (1 R. S., 748 [4 *id.*, 8 ed., 2459] § 26.)

If defendants were in as assignees of the unexpired term, the court can allow amendment to allege the facts showing privity, in place of the allegation resting on use and occupation, if defendant is not surprised to his prejudice. (*Bedford v. Terhune*, 30 N. Y., 453.)

Tenant holding over. In tenancies for a term fixed by the lease, or by law, for the want of a valid lease as to the term, the rights of the parties are determinate. The landlord in such lease has the right of an election. He may, if the tenant does not vacate the premises at the end of the term, treat him as a wrongdoer and bring ejectment, or take summary proceedings under the statute to remove him from the premises (see Code Civ. Pro., §§ 2231, 2232), and he is not required, before doing so, to serve the tenant with any notice to quit (*Park v. Castle*, 19 How. Prac., 29, and the cases there cited), or the landlord may waive his right to the immediate possession, and the wrong of the tenant in remaining beyond the expiration of the term, and recover of him the rent for another year, for the tenant by remaining over has, by implication, become a tenant for another year from the expiration of his term. (§ 21, *McAdam L. & T.*, citing *Schuyler v. Smith*, 51 N. Y., 309; *Mack v. Burt*, 5 Hun, 28; *Conway v. Starkweather*, 1 Denio, 118.) So absolute is the implication from holding over for a few days only, of a hiring for another year, that the tenant will not be excused from the payment of rent, even where he gave the landlord notice before the end of the term that he did not intend to hire for another year, and had hired other premises, which would be ready for his occupancy in a few days. (*Schuyler v. Smith, supra*; *Adams v. City of Cohoes*, 127 N. Y., 175, 182.) 5 6

Defendant a trespasser. If defendant was holding over, after the expiration of the term, the landlord has an election to treat him as thereby assenting to the position of a tenant, including the obligation to pay rent. (*Schuyler v. Smith*, 51 N. Y., 309; *Smith v. Allt*, 4 Abb. N. C., 205; s. c. 7 Daly, 492.) 7

In such case it is the better practice to allege the facts, rather than to rely on the general allegation of use and occupation. (*Schuyler v. Smith* above cited).

If defendant was holding in any other capacity than a tenant—as for instance, a purchaser holding over after forfeiture of his contract, or a trespasser having entered adversely, the landlord can sue in tort for damages for the trespass and dispossession; or he may waive the tort by stating the facts, alleging the reasonable value of the use and occupation,

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- 8 and recover as on contract. But for this purpose, the better opinion is that he should allege the facts so as to show unjust enrichment of defendant. (*Lazarus v. Phelps*, 152 U. S., 81, and see cases on Constructive Contracts, p. 149 of this vol.)

The remedy to *dispossess* a tenant, or purchaser holding over, a trespasser or a squatter, is by a special proceeding. (N. Y. Code Civ. Pro., §§ 2231, 2232), or by an action of ejectment (*id.*, § 1502.)

- 9 *An assignee of the lessor* and covenantee, the grantee of the demised lands, or the remainder man or reversioner coming in after the lessor's estate has terminated, and their heirs and personal representatives, have the same remedies as the assignor, grantor, or lessor. (1 R. S., 747 [4 *id.*, 8th ed., 2459], § 23.)

An assignee of the lessee is liable directly to the landlord or his assigns by virtue of the privity of estate. (*Bedford v. Terhune*, *supra*.)

HERNANDEZ v. STILWELL.

New York Common Pleas, General Term, January, 1878.

[Reported in 7 Daly, 360.]

- ✓ The complaint on a guaranty so qualified that the obligation of the guarantor is dependent on some endeavor to obtain payment from the principal—as in case of a guaranty of “the ultimate payment” of the instrument must allege facts as to demand or other effort to collect from the principal, and notice thereof to defendant.

- 1 The facts stated in the complaint are thus indicated in the appeal papers.

I. That one Richard Remington, on the 18th day of December, 1868, made his bond for the payment of twenty thousand dollars, one year after date, to wit, on the 18th of December, 1869.

- 2 II. That the defendant simultaneously, for one dollar, and other good and valuable considerations guaranteed the *ultimate* payment of the sum named therein, *together with interest and all lawful charges, or so much thereof as should be due* and owing.

III. That prior to the 30th day of July, 1875, there had been paid of the sum named in said bond \$2,963.33 as interest, and \$220.52 as principal.

IV. That there is now due on said bond to plaintiff \$19,779.48 with interest thereon from July 30, 1875.

Defendant demurred for insufficiency.

3

At Special Term the demurrer was overruled.

The Court at General Term reversed the order.

CHARLES P. DALY, Chief Justice. The defendant's obligation was a conditional undertaking. He guaranteed the *ultimate* payment of the sum of money named in the bond given by Remington to the plaintiff, together with interest and *all lawful charges*, or so much thereof as might be due and owing. He did not engage as principal. His obligation imposed upon him no duty but the ultimate payment, if Remington failed to pay, of what might be due on the bond, with interest and all lawful charges. It was a guaranty. He says: "*I expressly guarantee*," which is to engage for the payment of a debt, or the performance of a duty by another. (*Durham v. Manrow*, 2 N. Y., 549; *De Collyer on Guaranties*, p. 38.) A promise that if Remington did not pay the bond, that he would, guaranteeing "*the ultimate payment*" implies a default, or something which is to proceed, before he who guarantees is ultimately bound, or the word ultimate in the connection in which it is used has no meaning; and we are bound to give their ordinary meaning and full effect to the words used by the guarantor. (*Bissell v. Ames*, 17 Conn., 127; *White v. Reed*, 15 *id.*, 457; *Crist v. Burlingame*, 2 Barb., 351; *Leggett v. Humphreys*, U. S. N. S., 66; *Shore v. Wilson*, 5 Scott N. R., 1037; *Story on Promissory Notes*, § 472, pp. 599 to 603; § 474, p. 614; 2 *Parsons on Contracts*, 505; *Broom's Legal Maxims*, 456, 6th Amer. ed.).

4

5

Where the words are ambiguous, they are to be construed most strongly against the guarantor (*Mayer v. Isaac*, 6 Mees & W., 605), for it is his fault if they are so. But there is no ambiguity in the words "the ultimate payment," the word ultimate having a definite meaning, which is that another is to be resorted to, and if he makes default or cannot pay, the debt is secured by the ultimate liability of the defendant. This appears to me to be the plain meaning of the language, and implies some endeavor or diligence on the part of the creditor to secure the debt from the principal debtor—at least a demand of the debt from him—his failure to pay and notice to the guarantor, that

6

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- 7 he may at once take such measures as may be within his power to secure or indemnify himself. (2 Parsons on Contracts, pp. 25, 27 and 28, 6th ed.; Foote v. Brown, 2 McLean, 369; Oxford Bank v. Haynes, 8 Pick., 423; Story on Promissory Notes, §§460, 472.) I do not say that it requires that the creditor shall exhaust the ordinary legal remedies against the principal debtor to enforce the payment of the debt, as in the cases of a guaranty of the collection of a debt. (Craig v. Parkis, 40 N. Y., 181); but
- 8 the instrument contemplates the probability of such a procedure on the part of the creditor; as it provides not only for the ultimate payment of the sum named in the bond, with interest, or so much of it as shall be due and owing, but also the payment of *all lawful charges*. All that is recoverable upon the bond is what may be due upon it, with interest; and this additional undertaking for the payment of all lawful charges would appear to contemplate such lawful charges as the creditor may be put to by his effort, in good faith, to compel the payment of the bond by the principal debtor. The fact of such an additional undertaking goes very far to show that the engagement was meant to
- 9 be one of guaranty—an engagement that if Remington failed to or did not pay, the defendant would pay. That this was what was intended, further appears by what is put in the disjunctive, or “so much” of the sum of money named in the bond “as shall be due and owing,” implying that there might be a payment of a part of the sum by the principal debtor, and that the defendant’s engagement is for the ultimate payment of the residue, with interest, and all lawful charges.

- The word guaranty may be used when the engagement is an original and absolute one to pay the debt, when it becomes due.
- 10 But that construction is put upon it only when it is plain that that was the intent of the parties (Brown v. Curtiss, 2 N. Y., 225; Durham v. Manrow, *id.*, 534); as where the engagement was in fact to pay the guarantor’s own debt by means of the note of a third person, the payment of which he guaranteed, and which it was held, in the cases last cited, was not, within the statute of frauds, a special promise to answer for the debt, default or miscarriage of another; the rule in determining whether the instrument is an original undertaking or a guaranty

being, that the language used is to be so interpreted as to ascer- 11
tain and give effect to the real intention of the parties (*Crist v.*
Burlingame, 62 Barb., 351; *White v. Reed*, 15 Conn., 457).
Where a party therefore gives to his creditor, for the payment
of his own debt, a promissory note of another, and writes upon
the back of the note: "I guarantee the payment of the within,"
it is not a conditional but an absolute undertaking that he will
pay the note to the creditor when it becomes due, being himself
indebted to the creditor in the full amount of the note. That is
what is necessarily meant in such a case by the word guaranty;
for being primarily liable to the creditor for the full amount of 12
the note, the intent cannot have been that he was to pay the
amount only in the event of the failure or inability of the
maker to pay it. But there is nothing of this kind averred
in the complaint to give to the word guaranty a meaning other
than, and different from, what the word ordinarily implies. If
the bond were payable in instalments, then the word ultimate
might be understood as meaning an ultimate and absolute
engagement to pay the whole or whatever might remain due
upon it. But it was not. It was entered into on the 18th of 13
December, 1868, and was for the payment of the full sum of
\$20,000, with interest, on the 18th of December, 1869; the
interest being payable semi-annually, so that there is nothing
upon the face of the bond itself to give to the word ultimate a
special signification in connection with the instrument, or to
qualify the ordinary meaning of the word guarantee.

"The law," said Chief Justice MARSHALL, in *Russell v. Clark* (7
Cranch, 90), "will subject a man having no interest in the trans-
action to pay the debt of another, only when his undertaking
manifests a clear intention to bind himself for that debt. 14
Words of doubtful import ought not, it is conceived, to receive
that construction. It is the duty of the individual who contracts
with one man, on the contract of another, not to trust to
ambiguous phrases and strained constructions, but to *require* an
explicit and plain declaration of the obligation he" (meaning the
one entering into the obligation) "is about to assume." And
Justice STORY, in *Lawrence v. McCalmot*, in reference to such
obligations, remarks that words are not to be forced out of their

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15 natural meaning, but should receive a fair and reasonable interpretation.

The real inquiry, says *HOSMER*, Ch. J., in *Hall v. Rand* (8 Conn., 560), is, what was the intention of the defendant; and to ascertain this his words must be taken in their popular and obvious sense; that is, the true meaning of the contract which readily presents itself to a man of plain understanding on reading it attentively and impartially; and not that which is elaborated with effort.

16 In *Tuton v. Thayer* (47 How. Pr., 180), the defendant guaranteed the *payment* and *collection* of a note with costs, if any made. It was held that both words were to be taken together; that it was not a guarantee solely of the collection of the note; and that therefore it was not necessary to entitle the plaintiff to exhaust his legal remedy against the debtor; but that if he did so, the defendant, as he had guaranteed the collection, would, as in a guaranty for collection, be answerable, not only for the debt, but also for the costs incurred in the attempt to collect from the principal debtor; but it being a guaranty both of pay-
17 ment and collection, the holder had his election to proceed in the first instance either against the maker or against the guarantor; and if he did proceed against the former and failed to collect, he had his remedy against the guarantor for the expenses incurred; as well as for the debt. All that can be regarded as held in that case is, that in such a guaranty it is not necessary to exhaust the legal remedy against the principal debtor before resorting to the guaranty. It does not hold that this was an absolute and unconditional undertaking to pay the debt; but recognizes that the relation existed there of a
18 principal debtor and a guarantor; and for all that appears in the case, the defendant may have been notified of the failure of the maker to pay the note upon which his guaranty to pay it would become absolute.

In *Seaver v. Bradley* (6 Me. (6 Greenl.), 60, 64), the instrument sued upon was in these words: "I will be ultimately accountable to you for the sum of \$150, if the said Heald shall purchase goods of you, and should fail to pay you for them."

Heald purchased a bill of goods on a credit of six months, and

Hernandez v. Stilwell, 7 Daly, 360.

failing to pay for them, after the expiration of that time, the 19 creditor notified the guarantor of the amount sold to Heald on the faith of the guaranty, and his failure to pay. It was argued in that case that the guarantee was absolute; but the court held that it was not; that the undertaking was conditional. MELLON, C. J., said that the word "ultimate" meant, in that case, that the guarantor would pay if the defendant did not comply with the terms of his engagement; and the defendant having had due notice of the advances that had been made on the faith of the guaranty, and that the debtor had failed to pay for the goods, as he had agreed, at the expiration of six months; that 20 the guaranty, which was before conditional, became absolute when the guarantor was notified of what was advanced on the guarantee; and that Heald had failed to keep his engagement; and this notice having been given before the action was brought, that the plaintiff could recover on the guaranty. The question in the case was, whether the guarantor had been duly notified, there having been some delay in consequence of legal proceedings against the debtor. The court held the notice to be sufficient, as no injury had arisen to the guarantor by the delay and the 21 action was sustained.

In the present case, gathering the intent from the language used, I understand the obligation to mean that the defendant is to be liable if Remington fails or is unable to pay the bond when it falls due, as the original and principal debtor; and that, to recover against the defendant, it was necessary to aver that payment of the bond had been demanded of Remington, or that he was insolvent, or unable to pay, or something of that kind; and that the defendant was duly notified thereof, where- 22 upon his obligation to pay became absolute.

I think, therefore, that the demurrer to the complaint should have been sustained, and that the order overruling it was erroneous. No injury can arise from such a construction, as the guarantee expresses that it was upon a sufficient consideration.

JOSEPH F. DALY, J., concurred.

Order reversed.

The General Term order thereupon entered sustained the demurrer with costs and gave plaintiff leave to amend.

Cordier v. Thompson, 8 Daly, 172.

CORDIER v. THOMPSON.

New York Common Pleas, General Term, December, 1878.

[Reported in 8 Daly, 172.]

1. If the complaint alleges plaintiff's appointment as executor or administrator, and shows a cause of action in the representative capacity, the omission of the word "*as*," in designating the plaintiff, may be disregarded, for it will not mislead.
 2. The complaint of an executor or administrator on an instrument which shows that it was non-negotiable and delivered to the decedent as payee, need not allege that it has come to plaintiff's possession.
 3. The complaint on an unqualified guaranty written under a note and expressed to guaranty "the above obligation," need not allege demand on the guarantor, nor, it seems, notice of the default of the principal.
- 1 The complaint was as follows :

MARINE COURT OF THE CITY OF NEW YORK.

JOSEPHINE CORDIER, Administratrix of
the goods and chattels of Rosine
Cordier, deceased,

2

against

HENRY THOMPSON.

The plaintiff complains of the defendant and respectfully shows the court.

- I.—That on or about the 20th day of July, A. D. 1875, Rosine Cordier at the instance and request of one Jane Ferrero, did loan and advance unto the said Jane Ferrero the sum of two thousand dollars.
- 3

II.—That upon such loan and advance of money, to wit, on 20th of July, A. D. 1875, the said Jane Ferrero did execute and deliver a certain instrument in writing bearing date on that day, wherein and whereby she acknowledged indebtedness of the above mentioned sum of two thousand dollars and agreed to return or repay the same within two years from the date thereof,

to wit, the 20th of July, A. D. 1877, and the defendant did 4
then and there in writing on the said instrument promise and
agree on the same day and year and guarantee unto said Rosine
Cordier the performance of the obligation above mentioned on
the part of said Jane Ferrero ; and the said acknowledgement of
debt by the said Jane Ferrero, and guarantee to pay the same by
the defendant were, upon the loan of said sum of two thousand
dollars of said Rosine Cordier, duly delivered and transferred to
her.

III.—That previous to the 20th day of July, A. D. 1877, the 5
sum of six hundred dollars was paid upon the said obligation,
leaving due thereon, on that day, a balance of fourteen hundred
dollars.

IV.—That the said balance of fourteen hundred dollars was
not paid by the said Jane Ferrero on that day whereon the same
was due and payable, to wit, 20th July, A. D. 1877, but that
she made default therein, of all which, due notice was given to
the defendant, Henry Thompson.

V.—That the said sum of fourteen hundred dollars is still due 6
and unpaid with interest thereon from the 20th day of July,
A. D. 1877.

VI.—That in the month of December, A. D. 1876, the said
Rosine Cordier, then being a resident of the city of New York,
did depart this life intestate, unmarried and without issue ; and
that on or about the 20th day of July, A. D. 1877, the Surrogate
of the city and county of New York did appoint the plaintiff
administratrix of the goods, chattels and credits of said Rosine
Cordier, deceased, and that said plaintiff has duly assumed the 7
duties and charge of said office of administratrix.

WHEREFORE, the plaintiff demands judgment against the said
defendant for the sum of fourteen hundred dollars and interest
thereon from the 20th day of July, A. D. 1877, besides the costs
of this action.

Defendant demurred for insufficiency and the demurrer was
overruled.

Cordier v. Thompson, 8 Daly, 172.

- S . *At the trial* he relied on the same objection, and a verdict against him was directed.

The Court at General Term affirmed the judgment.

- VAN HOESSEN, J. Although the plaintiff does not expressly aver that she brings the action in her capacity as administratrix, and although the addition of the words "administratrix of the goods and chattels of Rosine Cordier" in the title of the complaint is a mere *descriptio personae*, I think a fair construction of the pleading shows that the plaintiff sued in her representative character. There is no doubt that a good pleader will never omit to place the word *as* between the surname of his client and the word administrator whenever he brings suit for the legal representative of an intestate. It has been said that the word *as* was, in such a case, indispensable (*Henshall v. Roberts*, 5 East., 154), but it would be a departure from the system of pleading established in New York if we should revive the strictness of the common law forms. Pleadings are to be liberally construed with a view to substantial justice (Code Civil Proc., § 519), and courts will not search for flaws if the substance of a good cause of action, or of a good defence, is stated by the pleader with sufficient clearness to apprise adverse parties of the issues to be tried. It is conceded that the complaint is not defective in its allegations of the making and the delivery of the instrument made by Mrs. Ferrero, and of the guaranty thereof made by the defendant. It is alleged that both the instrument and the guaranty were delivered to one Rosine Cordier at the time of the loan to Mrs. Ferrero, and then there are averments of the death of Rosine, of her residence in the city of New York at the time of her death, of her intestacy, of the time, place and manner of the appointment of the plaintiff as her administratrix by the surrogate of the city and county of New York, and of the entering of the plaintiff upon her duties as administratrix. These allegations would be useless, and worse than useless, unless the plaintiff were suing in her representative character, and they are pleaded so that the defendant could take issue upon them. (*Sheldon v. Hoy*, 11 How. Pr., 12; *White v. Joy*, 13 N. Y., 83.) The defendant could not fail to understand that the plaintiff
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- 11

was proceeding as administratrix to collect a demand which he 12
owed Rosine Cordier in her lifetime, and which the plaintiff
alleged to be part of the estate of the deceased. She stated
every fact essential to the establishment of her title as adminis-
tratrix, and if the facts alleged were all proved at the trial, would
it not be a mere mockery of justice if the plaintiff, with the
note in her hands, should be turned out of court for failing to
use a technical expression, which, if used, would not have aided
the defendant's defence? The case of *Hallett v. Harrower* (33
Barb., 537) is directly in point, and it disposes of the defendants 13
first ground of appeal.

The objection that the complaint does not allege that the
paper sued upon is the plaintiff's and in her possession, is not
tenable. The paper was non-negotiable and delivered to the
plaintiff's intestate. If it had been parted with by the intestate
or by the plaintiff, it was for the defendant to show the fact
(*Peets v. Bratt*, 6 Barb., 664).

The most serious question in the case is, whether the guaranty
of the defendant is an absolute or merely a contingent under-
taking. I think it must be construed to be a guaranty of pay- 14
ment, and, therefore, an absolute understanding. The principal
instrument is a non-negotiable promissory note. It is a promise
to pay Rosine Cordier, absolutely and at all events, the sum of
two thousand dollars two years after date.

The consideration for the note is expressed upon its face,
being the loan of fifteen hundred dollars in cash, and the trans-
fer of a note for five hundred dollars, payable November 12th,
1875. It is agreed that that note shall be accepted by Mrs.
Ferrero, the borrower, as so much cash. It is not to be accounted
for, nor does the obligation to pay Rosine depend upon Mrs. 15
Ferrero's success in collecting it. She agrees to pay two thous-
and dollars at the end of two years, absolutely and at all events.
Upon that note at the time the money is lent, the defendant
writes: "I guarantee the above obligation, Henry Thompson."
What obligation is it that he guarantees? That of paying
Rosine the money borrowed at the expiration of two years.
There is no condition expressed and none implied. His guaranty
is not of Mrs. Ferrero's responsibility, but that she shall pay at

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16 maturity. Upon a guaranty like that, he was not entitled to demand and notice, but became liable to pay the very instant that Mrs. Ferrero was in default. (*Brown v. Curtiss*, 2 N. Y., 227, 228; *Barhydt v. Ellis*, 45 N. Y., 110; *Allen v. Rightmere*, 20 John. 336.)

None of the other points taken by the appellant seem to me to require comment.

The judgment should be affirmed with costs.

CHARLES P. DALY, Ch. J., concurred.

Judgment affirmed with costs.

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Reed v. McConnell, 133 N. Y., 425.

REED v. McCONNELL.

New York Court of Appeals, 1892.

[Reported in 133 N. Y., 425.]

It seems that where a cause of action is imperfectly stated, or on the trial a variance is disclosed between the pleadings and the proof, not affecting the essential nature of the claim asserted, the court has ample power to grant relief without turning a party out of court. u

But where the allegation of the complaint is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, but a failure of proof; and no judgment can be rendered in favor of the plaintiff upon the pleading as it stands.

The complaint alleged a contract and its breach and claimed damages. At the trial plaintiff proved a contract void under the Statute of Frauds. *Held*, error to allow him without amendment to recover the value of the property received thereunder by the defendant.

A cause of action founded on a contract to recover damages for its breach is fundamentally different from a cause of action to recover the value of property received thereon by the party who afterwards repudiates it as void by the Statute of Frauds.

The substance of the allegations of the complaint appears in 1
the opinion of the court.

At Circuit, plaintiff had judgment after trial by court without a jury.

The General Term of the Supreme Court reversed the judgment for error in computing damages.

ANDREWS, J. [*after disposing of another question*]: There is an insuperable difficulty in the way of the plaintiff on this appeal. He has been allowed to recover upon a cause of action 2
not alleged in the complaint. He sought in his pleading to recover damages for the breach of an alleged contract. He failed to establish that any valid contract was made, for the reason that the contract proved was void by the Statute of Frauds. It is substantially admitted by the plaintiff that the contract sued upon is within the statute, but it is contended on his behalf that the defendants having on the trial insisted upon the statute as a bar to the enforcement of the contract, the plaintiff was entitled to recover in this action the value of any property

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3. received thereunder by the defendants from the plaintiff. The defendants on the trial contended that this was a new and different cause of action, not within the pleadings, and inconsistent with the cause of action alleged in the complaint. The plaintiff made no application for amendment. The trial judge overruled the contention of the defendants and awarded to the plaintiff, among other things, the sum of \$12,500, as the value of a bark contract, which the court found was a contribution of the plaintiff to the tannery enterprise, which was the subject of the void contract.

4. For a proper understanding of the question some of the essential facts should be stated. The complaint contained two causes of action. The *first* was for work, labor and services, and money paid and materials furnished by the plaintiff in building a tannery on premises of the defendants. The complaint, for a second cause of action, alleged that the work, labor and services, and the money and materials mentioned in the first cause of action, were rendered and furnished "under an agreement with the defendants that they would take the plaintiff as an equal partner

5. with the defendants in the tannery business to be carried on at the said tannery; that after the completion of said tannery by the plaintiff the defendants refused to take the plaintiff in as said partner, although often requested so to do, by means whereof the plaintiff has been damaged in the sum of fifteen thousand dollars, whereof the plaintiff demands judgment," etc. This was plainly a cause of action for damages for the breach by the defendants of the contract to admit the plaintiff as a partner in the tannery business. The nature of the alleged contract, whether verbal or written, was not alleged in the complaint.

6. The answer denied the contract alleged and interposed several defences and counterclaims. On the trial the plaintiff, in support of the second cause of action, gave evidence tending to show that in March, 1877, the plaintiff solicited the defendants to build a tannery on premises for which he had a contract of purchase. The plaintiff at the same time held a verbal option from one Griffin to purchase from the latter 50,000 cords of bark from his lands in the vicinity for the price of fifty cents a cord. It was thereupon verbally agreed between the plaintiff

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and defendants that the defendants should furnish the plaintiff 7
the money necessary to complete the purchase of the tannery
site and erect the tannery. The plaintiff was to cause the pro-
posed site to be conveyed to the defendants and to give the de-
fendants the benefit of his verbal option from Griffin for the
purchase of the 50,000 cords of bark and procure Griffin to enter
into a contract with them for the sale of the bark on the terms
of the verbal option. The plaintiff was to superintend the build-
ing of the tannery and when completed was to conduct the tan-
nery business therein for the defendants and was to receive as 8
his compensation \$1,000 a year and one third of the net profits.
The tannery site was conveyed to the defendants; the plaintiff
procured Griffin to enter into a contract with the defendants to
sell to them the 50,000 cords of bark at the price of fifty cents a
cord. The tannery was built and the plaintiff conducted the
business therein until October, 1878, when, as is found by the
trial judge, the defendants in violation of their contract and
without cause discharged him and refused further to carry out
their contract with him. The evidence shows that it was con-
templated that this arrangement between the parties was to 9
continue twelve years, that being the period which would, as
supposed, be required to exhaust the bark purchased of Griffin.

The plaintiff, as part of his case, was permitted, against the
objection of the defendants that the evidence was incompetent
and immaterial, to show the value of the bark contract. On the
assumption that the contract between the plaintiff and the de-
fendants was valid, the evidence was competent. The contract
had been wrongfully broken by the defendants. By the contract
the plaintiff was to share in the profits of the business. The fact
that the defendants had a favorable contract for the supply of 10
the tannery with bark might properly be considered in determin-
ing what the profits of the business would have been and the
loss sustained by the plaintiff from the breach of the contract of
employment. When this evidence was introduced no question
had been specifically raised as to the validity of the contract
under the Statute of Frauds, either in the pleadings or on the
trial. But at the conclusion of the plaintiff's evidence the defend-
ants moved to dismiss the complaint as to the second count, on

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- 11 the ground that the contract proved was void under the statute, and also to strike out all the evidence as to the bark contract as immaterial. The motions were denied and exceptions were duly taken. Upon the conclusion of the evidence the plaintiff's counsel insisted that, "the contract being void by the Statute of Frauds, the plaintiff is entitled to recover the value of his contribution to the tannery enterprise" and among other items the value of the bark contract. This claim was resisted by the counsel for the defendants on the ground that the plaintiff, having failed to establish the cause of action on the contract, was not
- 12 entitled to recover, on the theory that the contract being void, the defendants were liable for the value of property contributed by the plaintiff thereunder. The trial judge overruled the contention of the defendants and awarded judgment for the plaintiff, which included the sum of \$12,500, the value as found of the bark contract.

The recovery was in violation of the rule that no judgment can be sustained in favor of a plaintiff on a cause of action not alleged in the complaint, unless the defendant, by his silence or

13 conduct, acquiesced in the trial of the new and different cause of action upon which the judgment proceeded.

The tendency of modern legislation justly favors a liberal construction of pleadings in the interest of substantial justice. The Code requires that the allegations of a pleading shall be liberally construed, to promote this object. (Code, § 519.) The courts, adopting the new spirit, no longer apply the technical and artificial rules which formerly prevailed, whereby the rights of parties were often subordinated to the mere form in which they were asserted. But the rule that a party coming into court

14 asserting one cause of action cannot recover on another and different one, is unchanged. It is essential to the orderly administration of justice and the protection of the rights of litigants. Lawyers could never safely advise their clients, and parties would frequently be misled if any other rule was admitted. Where a cause of action is imperfectly stated, or on the trial a variance is disclosed between the pleadings and the proof, not affecting the essential nature of the claim asserted, the court has ample power to grant relief without turning a party out of court. But where

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the allegation of the complaint is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, but a failure of proof, and no judgment can be rendered in favor of the plaintiff upon the pleading as it stands. This is the statute rule and was the rule of the courts before the statute. The authorities upon these general propositions are numerous. We refer to some recent ones only. (*Southwick v. First Nat. Bank*, 84 N. Y., 420; *Truesdell v. Sarles*, 104 *id.*, 167.)

Testing the present case by these rules, it is clear that the judgment rendered for the plaintiff for the value of the bark contract was erroneous. The plaintiff alleged a contract in his second count and its breach, and demanded damages in the sum of \$15,000. It turned out on the trial that he had no contract and, therefore, that the defendants could not have broken any contract with the plaintiff. The cause of action alleged was not only not made out, but was affirmatively disproved. There was no basis for any recovery by the plaintiff on his second cause of action. The cause of action should have, therefore, been dismissed. But he was allowed to recover, notwithstanding his failure to prove the contract he alleged, because, in acting under the void contract, he had, pursuant to its terms, transferred certain property to the defendants, and it is claimed that the defendants, having insisted that the contract was void under the statute, they were bound to restore to the plaintiff any property, or the value of any property, they had acquired from and through him in pursuance of the contract and before its repudiation.

The general principle that a party to a void contract cannot repudiate it and retain what he has received from the other under it, is well settled. (*Day v. N. Y. C. R. R.*, 51 N. Y., 583 and cases cited.) The law in such case will raise an implied assumpsit in favor of the other party to accomplish justice and prevent fraud. But a cause of action founded on a contract to recover damages for its breach, and a cause of action to recover the value of property received thereon by the party who afterwards repudiates it as void by the Statute of Frauds, are fundamentally different. The claim that there was no valid contract, and that, therefore, there is a right of action for the value of

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19 the property received under it, is totally inconsistent with a claim to enforce the contract and to recover upon it. It is quite immaterial that the value of the bark contract may have been a material fact in support of the cause of action alleged, or that it supplied a basis for recovery in an action brought upon the theory that the contract was void. This action was not brought upon that theory, and because facts are developed in the trial of one cause of action which suggests a right of recovery in an action for a different cause, this does not authorize the substitution of the latter cause for the one alleged. The argument urged by
20 the appellant that the defendants waived their rights by not objecting specifically to the evidence of the value of the bark contract when it was first offered on the ground of the statute, is not, we think, tenable. They objected generally that the evidence was incompetent and immaterial. When the plaintiff rested they took the point that the contract proved was void by the statute. The plaintiff had ample notice of the ground taken. He applied for no amendment of the complaint, but, on the contrary, insisted that he was entitled to recover the value of the
21 bark contract under the pleadings as they stood.

All the judges concurred.

Judgment affirmed.

NOTE: In *Southwick v. First National Bank*, 84 N. Y., 420, it was *held*:

1. Under a complaint alleging that defendant undertook to collect a draft and apply its proceeds to a specified purpose, and that he collected the draft but failed so to apply the proceeds, although requested so to do, plaintiff cannot, against objection at the trial, recover on the theory of a conversion, or a payment to defendant by mistake.
2. An amendment of the complaint after a recovery at the trial cannot be allowed in such a case, for it would substantially change the claim.
- 22 3. A cause of action for breach of a promise to pay a debt is different from a cause of action for money paid to defendant under mistake, or for conversion of the money; especially when the only demand alleged was a demand for the performance of the promise.
4. A party has a right to rely upon the frame and contents of his adversary's pleading, and to object at the trial to litigating a different cause of action, even though he may have been apprised from other sources than the pleading that such other claim was made.

In delivering the opinion of the court, EARL, J., said upon the question of amendment:

Here, although the defect in the complaint was pointed out in due time

Freer v. Denton, 61 N. Y., 492.

upon the trial, no amendment was asked for or ordered. This is not a case where the pleadings can, after the trial, be conformed to the proof, as such an amendment would change substantially the claim of the plaintiff as alleged. This is not a case of mere variance or mere defect, but a case of failure to prove the cause of action alleged in its entire scope. Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary. * * * *

It is no answer to this objection that the defendant was probably not misled in its defense. A defendant may learn outside of the complaint what he is sued for and thus may be ready to meet plaintiff's claim upon the trial. He may even know precisely what he is sued for when the summons alone is served upon him. Yet it is his right to have a complaint, to learn from that what he is sued for and to insist that that shall state the cause of action which he is called upon to answer, and when a plaintiff fails to establish the cause of action alleged the defendant is not to be deprived of his objection to a recovery by any assumption or upon any speculation that he has not been injured. 24

FREER v. DENTON.

New York Commission of Appeals, 1875.

[Reported in 61 N. Y., 492.]

1. An action to recover back money paid by plaintiff, is not the less an action on contract by reason of allegations in the complaint showing that the payment was induced by defendant's fraud. e
2. Where the complaint to recover back money paid, alleged a contract between the parties for a sale by defendant to plaintiff, and that defendant by fraud induced plaintiff to make the contract, and to pay the money in question upon it, and also that defendant was unable to perform, refused to perform, and repudiated the contract,—*Held*, that here were two causes of action, and plaintiff could recover on proving the breach, without proving the fraud.*
3. The objection that the causes of action were not separately stated, must be taken, if at all, by motion.

Action by purchaser against vendor, after breach by the latter, 1
to recover back money paid.

* Under the present statute (C. C. P., § 549), if, in an action upon contract, express or implied, plaintiff incorporate among the allegations of the complaint a charge of fraud on defendant's part in contracting, or incurring the liability, or subsequently disposing of his property, he cannot recover on the trial of the action unless he proves such allegations.

But they may be struck out by leave to amend on the trial.

Freer v. Denton, 61 N. Y., 492.

2 The complaint alleged :

"That plaintiff and defendant entered into a contract on the day of the date thereof, in the words and figures following, to wit :

[*Here was set forth a contract for the sale and conveyance by the defendant, to the plaintiff, of a specified farm described as "including the Abm. Schoonmaker lot,"*] \$800 to be paid on or before July 1, 1869, and the balance of the price on or before April 1, 1870, deed to be given on receiving such payment.

3 "That to induce the plaintiff to enter into said contract the defendant falsely and fraudulently, prior to the making of said contract, represented to the plaintiff that he was the owner of or authorized to sell the premises which in said contract are called the Abm. Schoonmaker lot, and which said lot contained about seventy-five acres.

"That the plaintiff, relying on said representations, was induced to enter into and execute said contract, and to pay to the said defendant the first installment mentioned in said agreement, to wit, the sum of \$800, which was made July 1, 1869.

4 "That at the time when the said defendant made the said representation, and at the time when he received from the said plaintiff the said sum of \$800, the defendant well knew that the representations which he had made to the plaintiff in regard to the said Abm. Schoonmaker were false, said defendant not being then the owner nor authorized to contract to sell the same, nor has he ever been such owner, nor authorized to contract for the sale thereof, and the plaintiff alleges that such representations were made expressly to cheat and defraud the plaintiff.

5 "That said defendant has never carried out the said contract or been able to do so, and has expressly refused to carry out the same, and finally notified the plaintiff prior to the commencement of this suit that he (said defendant) would neither carry out said contract or refused to repay [*sic*] to the said plaintiff the said sum of \$800, or any part thereof. By means of the premises herein mentioned the said plaintiff has sustained great loss and injury."

. As a separate cause of action the complaint stated a claim for \$4,000 damages for fraudulently inducing plaintiff to enter into

Freer v. Denton, 61 N. Y., 492.

the contract, and refusing to perform, thus depriving plaintiff of his bargain, and putting him to great expense, etc. 6

On the trial it appeared that on March 22, 1870, plaintiff was ready and offered to perform, and demanded a conveyance, but that defendant was unable to give title to the Schoonmaker lot, and absolutely refused to perform, and expressly repudiated the contract. The action was commenced the next day.

At Circuit plaintiff had a verdict.

The General Term of the Supreme Court affirmed the judgment. 7

The Commission of Appeals affirmed the judgment.

EARL, C. The plaintiff did not prove the frauds alleged in the complaint, and no question of fraud was submitted to the jury. If, therefore, this was, under the complaint, necessarily an action of fraud, the plaintiff should have been defeated.

Upon the facts stated in the complaint, the plaintiff could recover the money paid by him upon either one of two theories: (1) He could avoid and repudiate the contract on the ground of the fraud alleged, and recover back the money, because it had been obtained from him by fraud, and the defendant had no right to retain it; or (2), he could rescind the contract, because the defendant refused to perform and repudiated the same, and thus held his money without any consideration therefor. 8

Upon either theory the action is based upon the promise to pay back the money implied by law (*Byxbie v. Wood*, 24 N. Y., 607), and is one, therefore, upon contract. An action for money had and received lies, in all cases, where one has had and received money belonging to another without any valuable consideration given on the receiver's part, for the law construes this to be money had and received for the use of the owner only, and implies that the person so receiving promised and undertook to account for it to the true owner; and in case a defendant be under an obligation, from the ties of natural justice, to refund money, the law implies a debt, and gives this action founded on the equity of the plaintiff's case. (3 Bl. Com. 163; *Cobb v. Dows*, 10 N. Y., 335; *Moses v. Macferlan*, 2 Burr., 1005.) No 9

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10 error was, therefore, committed at the Circuit in the holding that the plaintiff was not bound to prove his allegations of fraud.

The facts stated in the complaint showed two causes of action, one to recover back the money paid, because the defendant refused to perform and repudiated the contract, and this was made out without proof of any fraud; and another to recover back the money paid, on the ground that it was obtained from the plaintiff by fraud. These two causes of action could be united in the same complaint, but should have been separately
11 stated. No objection was, however, made that they were not thus stated, and such an objection could only be made by motion. (*Bass v. Comstock*, 38 N. Y., 21.)

The only other question to be considered is, whether the action could properly be commenced before the 1st day of April, 1870. It is the settled law of England that if, before the time appointed for performance of a contract, one party gives notice to the other that he will not perform the same, and repudiates the same, the other party may treat the contract as
12 broken, and at once commence an action to recover his damages as for a breach thereof. (*Hockster v. Delatour*, 2 E. & B., 678; *Danube and Black Sea Co. v. Xenos*, 13 C. B. [N. S.], 825; *Frost v. Knight*, 74 Law Reports, 111.) And this doctrine, while it may not be regarded as settled, has received some countenance in this State. (*Burtis v. Thompson*, 42 N. Y., 246.)*

But it is not necessary to invoke this doctrine to uphold the judgment in this case. The contract provides for the payment of \$800, "on or before the 1st day of July, 1869, and the balance on or before the 1st day of April, 1870," and that the
13 party of the first part, on receiving payment "at the time and in the manner" mentioned, would execute the conveyance. The plaintiff had, therefore, the right to make the payment, and demand the deed before the 1st day of April, and thus fix the time of performance by defendant before that date. The plaintiff having shown his readiness and offer to perform, and a refusal by the defendant to perform, in March, before the

* See also *Howard v. Daly*, 61 N. Y., 362, now our leading case.

Eggers v. Klussmann, 16 Abb. N. C., 226.

commencement of this action, had the undoubted right to 14
commence this action before the 1st day of April, for a breach
of the contract, or to recover back the money paid by him.

I am, therefore, of opinion that the judgment should be
affirmed, with costs.

REYNOLDS and DWIGHT, CC., concurred.

LOTT, Ch. C. and GRAY, C., dissented.

Judgment affirmed.

EGGERS v. KLUSSMANN.

New York Supreme Court, Special Term, 1885.

[Reported in 16 Abb. N. C., 226.]

A complaint merely alleging plaintiff's wager, and deposit pursuant 8
thereto with the defendant as a stakeholder, and demand for the
amount and refusal prior to the action, without alleging the nature of
the wager or where it was made, is demurrable for not stating facts
sufficient to constitute a cause of action.

Demurrer to complaint. 1

Plaintiff sued to recover money deposited with defendant
upon a wager.

The complaint alleged: "That on or about October 26, 1884,
plaintiff made a wager with one J. E. D. Bosche, and in pursu-
ance of said wager he deposited with defendant as stakeholder
upon said wager or bet the sum of one thousand dollars, and that
thereafter, and on or about November 18, 1884, and before the
commencement of the action, he demanded the return of said
deposit from defendant, which was refused."

The statutes of this State provide: "All wagers, bets or stakes 2
made to depend on any race, or upon any gaming by lot or
chance, or upon lot, chance or casualty, or unknown or contin-
gent event whatever shall be unlawful. All contracts for or on
account of any money or property or thing in action so wagered,
bet or staked shall be void." (1 R. S., 662 [3 *id.*, 8 ed., 2218], § 8.)
"Any person who shall pay, deliver or deposit any money,
property or thing in action, upon any event of any wager or bet

Eggers v. Klusmann, 16 Abb. N. C., 226.

- 3 herein prohibited, may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet or stake, or any part thereof, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not." (*Id.*, § 9.)
- 4 "The two last sections shall not be extended so as to prohibit or in anyway affect any insurance made in good faith for the security or indemnity of the party insured, and which are not otherwise prohibited by law; nor to any contract on bottomry or repondentia." (*Id.* § 10.)

Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

LEWIS, J. It does not appear by the complaint what the wager was, where it was made, where the money was deposited with defendant, or whether the demand was made before the money was paid over by the stakeholder to the winner.

- 5 All wagers are not illegal at common law. (1 Whart. on Contr., § 449.) If illegal, it is because they are made so by statute. Wagers are made illegal by the statute of this State, and money deposited may be recovered of the stakeholder even after he has paid it to the winner. Aleatory contracts are not prohibited by the statutes of the state of Louisiana. (*Grayson v. Whatly*, 15 La. Ann., 525.)

Courts cannot take judicial notice of laws of other States not according to the common law. (*Holmes v. Broughton*, 10 Wend., 75; *Harris v. White*, 81 N. Y., 532, 534.)

- 6 As the plaintiff has no remedy at the common law to recover back money deposited upon wager, he must recover, if at all, by force of a statute, and must by his complaint bring himself within its provisions. (*Langworthy v. Broomley*, 29 How. Pr., 92; *Cole v. Smith*, 4 Johns., 193; *McKeon v. Caherty*, 3 Wend., 494.)

The place being material, and the pleading being silent in regard thereto, the presumptions are against the pleader. (*Cruger v. Hudson River R. R. Co.*, 12 N. Y., 190, 201.)

If the deposit was made without the political jurisdiction of the State of New York, there is nothing in the complaint show-

Krower v. Reynolds, 99 N. Y., 245.

ing that there is any law of the State, territory or country where the deposit was made giving a cause of action to plaintiff. 7

Demurrer sustained.

KROWER v. REYNOLDS.

New York Court of Appeals, 1885.

[Reported in 99 N. Y., 245; rev'g 19 Weekly Dig., 383.]

1. The objection that facts constituting several causes of action are mingled as if a single cause, is waived if not taken by motion.
2. A plaintiff may join in his complaint different causes of action, even though inconsistent in theory, provided only that they all belong to one of the classes mentioned in section 484 of the Code.
3. In a complaint based on a foreign judgment, allegations relating to a covenant on which that judgment was based, are not to be construed as an attempt to set out an independent cause of action on such covenant, where an averment material to such cause of action is wanting, and where the allegations, though not necessary, are proper, considering the complaint as an action on the judgment.

The allegations of the complaint were as follows: 1

That on or about the 18th day of January, 1875, one Marshall F. Shaw executed under his hand and seal, and delivered to one William O. Capron, a bond in the penal sum of \$10,000, with a condition that if said Shaw should pay to said Capron or his assigns the sum of \$5,000 upon the 18th day of January, 1877, with interest thereon at the rate of seven per centum per annum, payable semi-annually, without fraud or delay, then the said obligation should be void, otherwise it should remain in full force and virtue.

That at said time, as collateral security for the payment of said bond, according to the terms thereof, the said Shaw duly executed, acknowledged and delivered to the said Capron a mortgage by which he did grant and convey to the said Capron, as security as aforesaid, certain real estate therein described and situate in the city of Bergen, County of Hudson and State of New Jersey. 2

That said mortgage was duly recorded in the office of the

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- 3 clerk of said county, in book of mortgages 115, at page 453, on the 2d day of February, 1875.

That on or about the 28th day of January, 1875, said Capron, by an instrument in writing under his hand and seal, for a valuable consideration, duly assigned said bond and mortgage to said Levi Oudkirk, which assignment was on the 2d day of February, 1875, duly recorded in said office, in book 24 of assignments of mortgages, at page 525.

- 4 That on or about the 8th day of April, 1876, said Shaw and his wife, by a deed duly executed, acknowledged and delivered by them to the defendant, granted and conveyed to him in fee a part of said real estate, which said deed was accepted by said defendant.

That said deed contained a provision that said real estate was so conveyed subject to said mortgage, and the said defendant did, by the terms thereof, in consideration of said conveyance, assume and agree to pay the same.

That he thereby became liable to the said Oudkirk for the payment of the same.

- 5 That on or about the 31st day of July, 1877, said Oudkirk duly commenced an action in the Court of Chancery in the State of New Jersey, which said court is a court of general jurisdiction, duly created by the laws of said State, against said Shaw and said Reynolds and others, by process of subpoena duly issued in said action, which was duly served upon the defendant therein, and that such proceedings were thereupon duly had in said action; that on or about the 26th day of October, 1877, the plaintiff recovered a judgment, which was duly given by said court against the defendant, for the sum of \$5,053.78, no part of which has
6 been paid.

That by the law of the said State the interest upon the same runs at the rate of seven per centum per annum.

That said judgment was so recovered upon the said liability created by the said deed to said Reynolds.

And he alleges that thereafter said Oudkirk died, leaving a last will and testament.

And that thereafter and on or about the 7th day of April, 1880, said will was duly admitted to probate by the Surrogate

of the county of Kings, and letters testamentary thereon were there duly granted and issued to these plaintiffs, who thereupon duly qualified and accepted said trust, and entered upon the duties thereof, and ever since have been and still are the executors of said will. 7

Wherefore, the plaintiffs demand judgment against the defendants for \$5,053.78, and the interest thereon from the 26th day of October, 1877, besides the cost of this action.

The allegations of the answer were :

First.—Defendant admits the execution of the deed by Marshall F. Shaw and wife mentioned in the complaint, and the recording thereof, and that the same contained a clause which has been claimed, by interested parties, to make him personally liable for the mortgage debt, but whether such clause was sufficient to create such liability he has no knowledge or information sufficient to form a belief thereof. 8

Second.—He admits the execution of the bond and mortgage mentioned in the complaint, and the recording of the latter, and the assignment of both to Oudkirk, as set forth in the complaint, but he alleges that, as he is informed and believes, the said mortgage and bond were given and held as security for \$4,200 only, and not for \$5,000, and that said Oudkirk paid only \$4,200 therefor, and that the same was never a lien upon said premises for more than \$4,200 as the principal sum, and that the same was given as a security for such moneys as the mortgagee should loan or advance from time to time to the mortgagor, not exceeding \$5,000, and that the sum actually so loaned or advanced did not exceed \$4,200. 9

And further answering, as to the allegations of the complaint respecting the commencement of an action by Levi Oudkirk in the Court of Chancery of New Jersey, and as to the service of a subpoena or any process, in any manner, for the commencement of the said action against the defendant, or any other person, and as to the recovery of the judgment mentioned in the complaint against the defendant, and as to the lawful rate of interest in said State being seven per cent., and as to the making and proving of the will of said Oudkirk, and the appointment of the 10

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- 11 plaintiff; as executors thereof, he denies that he has any knowledge or information thereof, or of any or either of them, to form a belief as to them or any or either of them, and he denies that said action was duly commenced against him, and that any subpoena or other process in said action has ever been served upon him, and he denies that said court ever acquired jurisdiction to render said judgment against him.

[*The second defence and conclusion are here omitted.*]

- Upon the trial, the plaintiffs proved the issuing of the letters
12 testamentary, and rested.

Defendant's attorney moved for a non-suit on the ground of a failure to prove the cause of action set forth in the complaint, or to prove any cause of action.

The Supreme Court at Circuit denied the motion; and after receiving defendant's evidence directed a verdict for the plaintiff, and ordered the exceptions to be heard at General Term in the first instance. (C. C. P., § 1000.)

- 13 *The General Term* denied defendant's motion, made upon the exceptions, for a new trial, and directed judgment to be entered for plaintiff upon the verdict. [*After stating substance of the pleading the opinion of the court continued:*] "We discover no error in the ruling. The complaint alleged facts constituting a cause of action arising out of the agreement in the deed, and those facts were not denied in the answer.

"True, the complaint did not set out the language of the deed, but it averred that by the terms of the deed the defendant agreed to pay, and that averment was not denied.

- 14 "The defendant having answered the complaint and denied the validity of the judgment, as against himself, could not be heard at the trial to assert that the complaint showed that his liability upon the agreement was merged in the judgment.

"Nor could he object that the suit was brought without leave of the court after an action to foreclose the mortgage (even if that objection is available under our statute where the foreclosure action is brought in a foreign State; a point we do not decide), for the reason that such objection may be raised by answer in the

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nature of a plea in abatement. (McKernan v. Robinson, 84 N. 15 Y., 105.) And, not being so raised, is waived."

[*The rest of the opinion did not discuss any question of pleading.*]

Judgment ordered for plaintiff.

The Court of Appeals reversed the judgment.

ANDREWS, J. Judgment in the action was recovered against the defendant upon his covenant in his deed from Shaw to assume and pay the mortgage on the granted premises, executed by Shaw to Capron. The trial judge in substance ruled that the complaint set forth two causes of action, one upon the covenant and the other upon the deficiency judgment against Reynolds, founded on the covenant, rendered by the New Jersey court in an action for the foreclosure of the Capron mortgage, in which Reynolds was joined as a party defendant. The defendant insists that only one cause of action was set forth in the complaint, to wit, a cause of action on the judgment and that the plaintiff having failed to prove a valid judgment against him, the complaint should have been dismissed. This presents the main question on this appeal. The allegations in the complaint are embraced in a single statement, or count, and if it embraces two causes of action, the pleading does not conform to the requirement of the Code. (§ 483.) But an omission to separate two different causes of action in a complaint is a defect to be corrected on motion. If the defendant proceeds to trial without making his motion, the defect, being in a matter of form only, and not affecting a substantial right, will be disregarded. (Code, § 723.) The question to be determined is whether the complaint in substance set forth two causes of action, or a cause of action on the judgment only. It alleges the making of the bond and mortgage by Shaw to Capron, an assignment to Oudkirk, the plaintiffs' testator; the subsequent purchase of the mortgaged premises by Reynolds, the defendant, the assumption by him of the mortgage, and his covenant to pay the same in consideration of the purchase and conveyance, the subsequent commencement by Oudkirk of an action to foreclose the mortgage in the Court of Chancery in New Jersey, alleged to be a court of general

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19 jurisdiction, against Shaw, Reynolds and others by process duly issued and served on the defendants therein, in which action judgment was duly recovered by the plaintiff against Reynolds on the 26th day of October, 1877, for \$5,053.78, on his liability on his covenant, the death of Oudkirk and the appointment of the plaintiffs as his executors. The complaint concludes by demanding judgment against Reynolds for \$5,053.78, with interest from October 26th, 1877, the date of the judgment. It is to be observed that upon the facts stated in the complaint, the

20 covenant was merged in the judgment and no subsequent action on the covenant could be sustained. This consideration is not decisive upon the point in controversy, because a plaintiff may join in his complaint different and even inconsistent causes of action, provided only that they all belong to one of the classes mentioned in section 484 of the Code. But the fact that an action on the covenant could not be maintained after a judgment had once been rendered thereon has a material bearing upon the construction of the pleading. The pleader has blended in a single statement the averments of the making of the covenant

21 and the subsequent recovery of a valid judgment thereon. Did he intend to set forth in this single statement two inconsistent causes of action, or only one cause of action, that is to say, a cause of action on the judgment, inserting the allegations as to the bond and mortgage, and the assumption of the debt by the defendant and his covenant to pay the mortgage, only by way of introduction or inducement to the final fact, viz., the recovery of the judgment? This latter seems the most natural and reasonable construction of the pleading. There is another material consideration. The complaint does not contain the averments

22 necessary to a complete cause of action on the covenant. It alleges the making and the consideration of the covenant, and that the defendant thereby became liable to pay the mortgage. But there is no breach alleged. This was necessary. (*Marie v. Garrison*, 83 N. Y., 23.) There is no averment that the mortgage had not been paid or that Reynolds had failed to perform his covenant. If the averments in respect to the judgment should be eliminated, the complaint would have been demurrable, as not stating facts sufficient to constitute a cause of action. If

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the parties had gone to trial on a complaint so framed, an amend- 23
ment would doubtless have been allowed, but the point here is
whether allegations proper, if not necessary, to a cause of action
on the judgment, by way of inducement, are to be construed as
intended to set up an independent cause of action, and this when
a material averment to such cause of action is wanting. The
answer of the defendant admitted the facts alleged in the com-
plaint as to the making of the covenant, but denied the judgment
and set up certain facts by way of equitable defence thereto. On
the trial the plaintiffs made no attempt to prove the judgment
alleged in the complaint, but rested on proof of their appoint- 24
ment as executors. The defendant thereupon moved for a non-
suit on the ground that the plaintiffs had not proved the cause of
action set forth in the complaint.

We think the motion should have been granted. We fully
approve of the rule that pleadings should be liberally construed,
with a view to promote substantial justice, but we are of opinion
that the complaint in this case, fairly construed, sets forth a
single cause of action upon the judgment and does not embrace
a cause of action on the covenant. 25

The judgment should be reversed and a new trial granted.

All the judges concurred.

Judgment reversed.

NOTE.—The short form allowed by Code Civ. Pro., § 532, of alleging
judgments and determinations of courts and officers of special and limited
jurisdiction to be alleged as “duly given or made,” is applicable to al-
leging a judgment or other determination of a Federal court or officer
when pleaded in a state court. It is the better opinion that such provision
is also applicable to judgments and other determinations of courts or
officers of sister states. (Abb. Br. on Pl., §§ 279, 285, and cas. cit.) 26

Where the court rendering the judgment is one of general jurisdiction,
the facts showing jurisdiction need not be alleged. This was the rule at
common law, and has not been changed in the Code. (*Id.*, §§ 277, 278; 2
Chitt. Pl., 414.

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EVERITT v. CONKLIN.

New York Court of Appeals, October, 1882.

[Memorandum in 90 N. Y., 645.]

1. A complaint stating the details of the circumstances under which the plaintiff paid money to defendant's use, is not bad because of stating those circumstances so as to present an alternative as to the legal theory of the transaction, if on either alternative defendant is bound *ex aequo et bono* to return the money.
 2. The complaint showed that plaintiff's assignor made a note for defendant's accommodation and afterward paid it, and alleged that even if it should be found (as defendant might claim) that the note was applied on a contract between the parties, yet the contract was meanwhile duly rescinded, and therefore plaintiff was still entitled to recover the money. *Held*, a proper mode of pleading the alternative grounds of recovery.
 3. In such a case it is not error to refuse to require the plaintiff at the trial to elect upon which theory he would proceed.
- 1 Plaintiff sued defendant in a county court, and alleged :
- I.—That the defendant is a resident of the county of Chemung.
- II.—Upon information and belief, that on or about Nov. 8th, 1876, one John G. Copley and the defendant entered into an agreement in writing [*of which a copy was here set forth*], by which agreement Conklin sold a farm to Copley, at a stipulated price per acre, amount to be fixed after survey, and \$10,000 payable in three months from the date of the agreement, \$10,000 more about a year after, and the balance still later; the parties
- 2 agreeing "that upon the payment of the first \$10,000" the deed should be given.

III.—That after the execution of said contract and before any payment was due thereunder, to wit, on or about the 19th day of December, 1876, the said John G. Copley executed and delivered to the defendant his promissory note in writing, dated on that day, whereby he promised to pay to the order of James R. Conklin, the defendant, five hundred dollars, three months after date, with interest. That said note was so executed and delivered by the said John G. Copley to the defendant, at the

defendant's request, for the purpose of enabling the defendant 3
to discount the same and raise money thereon for his own use.
That at the time of the execution of said note, said Copley was
not and never since has been indebted to the defendant in any
sum whatever, and said Copley never received anything for said
note. That said note was so executed and delivered solely as an
accommodation note, but it was agreed that the amount thereof,
with accrued interest, might be deducted by said Copley from
the said sum of ten thousand dollars, which was to fall due from
said Copley to defendant upon said contract three months from
its date, if said Copley chose so to do. 4

That soon after the execution and delivery of said note and
before its maturity the defendant endorsed said note and trans-
ferred the same to Lewis M. Smith and Henry L. Bacon, who
thereupon became the lawful owners and holders thereof.

That said note was not paid at its maturity, but was protested
for non-payment, and notice thereof duly given to the defendant.
[*The complaint then alleged at some length the fact that judg-
ment was recovered by the indorsees against the maker under an
arrangement with the payee, indorser, that the judgment should be
collected of the maker if possible, and, if not, the indorser would* 5
*pay it with the costs and expenses; that after execution returned
unsatisfied against the maker supplementary proceedings were
had against him, and he subsequently paid the judgment and
interest, and the costs of the supplementary proceedings amount-
ing in all to the sum of \$578.98.*]

IV.—That the said John G. Copley was ready and willing to
perform the conditions of said written contract hereinbefore set
forth, on his part, three months from the date thereof, when by 6
the terms of said contract the defendant was to execute and
deliver the deed as in said contract provided; and the said
Copley to pay the said defendant ten thousand dollars, and to
execute and deliver to the defendant a bond and mortgage for
the balance of the purchase price of said farm; but the defend-
ant did not perform on his part, and was unable to convey to
said Copley the fee simple of said farm, free and clear from all
incumbrances of every description, as by said contract he had
agreed to to, and that at the time when, by the terms of said con-

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- 7 tract, said deed was to be delivered and said farm so conveyed to said Copley, said farm was, and ever since has been, incumbered with [here the incumbrances were described in detail and the complaint continued], and by reason of such incumbrances the said John G. Copley rescinded said contract, and demanded that the defendant pay said note and the judgment which was recovered thereon as hereinbefore stated, and at the time when said Copley paid said judgment and costs, as hereinbefore alleged, the said defendant was present, and the said Copley
8 stated to him that the same was for defendant to pay, and that he paid it because he was compelled so to do, and that he should make the defendant repay the same to him; and that the defendant repeatedly requested said Copley to pay the same. That said Copley demanded of the defendant that he repay to him the sum so paid out; but the defendant refused so to do.

- V.—That shortly after the execution of the said agreement between said John G. Copley and James R. Conklin, the defendant, and on or about December 30th, 1876, said Copley, at the defendant's request, and on his written order, paid Whitfield
9 Farnham, the surveyor, who surveyed the said farm, for his services in making such survey the sum of ten dollars.

VI.—That by reason of the matters hereinbefore alleged, the defendant became indebted to said John G. Copley in the sum of \$588.98, no part of which has ever been paid.

- VII.—That before the commencement of this action the said John G. Copley, duly sold, assigned and transferred to this plaintiff the said indebtedness of the defendant to him, and all of his right of action against the defendant arising therefrom and
10 growing out of the matters aforesaid, and this plaintiff is now the lawful owner thereof.

WHEREFORE, etc.

At the trial in the County Court the plaintiff had a verdict; and defendant moved for a new trial.

DEXTER, J., County Judge, on denying the motion, said, in respect to the question of pleading:

If it be assumed that the complaint sets forth two causes of

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action that could not be properly joined, the defendant should 11 have demurred, and, having failed to do so, he has waived the misjoinder and could not take advantage of it at the trial. (*Blossom v. Barrett*, 37 N. Y., 434.)

If it be assumed that there are certain allegations in the complaint that are irrelevant or redundant, then the defendant should have moved to strike out, and by omitting so to do, and answering the same, he must be held as having accepted the issues thus made. (*Quintard v. Newton*, 5 Robt., 22; *Kellogg v. Baker*, 15 Abb. Pr., 286.)

The first issue between the parties was whether the note was 12 to apply as a payment, or was for the accommodation of the defendant.

The complaint anticipates the defence that it was a payment, and alleges the rescission of the contract before the maturity of the note and before the money was paid by Copley.

The sixth subdivision of the complaint avers that by reason of the matters hereinbefore alleged, the defendant became indebted to said Copley in the sum of \$588.98, no part of which has been paid. 13

Thus the ground of recovery is placed upon all the facts in the complaint set forth, and the defendant by his answer having admitted or joined issue upon all of them, we do not think the defendant at the trial had the right to require the plaintiff to be limited to a part of the issues thus made in his proofs or his grounds of recovery.

The plaintiff did not introduce evidence inconsistent with his claim that the note was an accommodation note. He only claimed that, even if the defence set up was true, he was still entitled to recover on the ground that the contract upon which it was 14 claimed he had given the note was rescinded, and by the default of the defendant before he had paid the money on the judgment recovered on the note; and in so doing he kept within the issues made by the pleadings, and which issues the defendant had accepted by going to trial thereon.

We therefore conclude that no error was committed in refusing to require the plaintiff to elect what theory he would base his right of recovery upon, and confine him thereto in his proofs.

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- 15 *The Supreme Court at General Term* affirmed the judgment and order on substantially the same ground without discussing the question of pleading in detail.

The Court of Appeals affirmed the judgment and order.

- FINCH, J. We agree with the learned counsel for the appellant in the fundamental propositions of his argument, that there was but a single cause of action stated in the complaint, and that it could not be displaced on the trial by one different and inconsistent with it, and not within the scope of the pleading. But
- 16 we disagree with him as to what the essential cause of action stated in the complaint really was. He describes it as an action to recover moneys paid on an accommodation note. We deem it an action for money had and received by the defendant to the use of the plaintiff's assignor, and which, *ex aequo et bono*, the defendant ought not to retain. The details of fact and the special circumstances which go to establish and prove this cause of action, may be very various and differ widely while yet such cause of action may remain the same. It was upon such a theory
- 17 that the complaint was framed. Practically, the plaintiff said: The defendant has got my money without any consideration and without any legal or equitable right to retain it, and refuses to pay it back on demand; and this is true; because I made and paid a note for his accommodation; and even if it should be found, as he is likely to claim, that the note was applied on a land contract, still I insist that my cause of action remains and the money was mine and not his; because I rescinded that contract, as I lawfully might, and so am still entitled to recover for money had and received. We can see no impropriety in such a
- 18 mode of pleading. It states all the facts, and states them consistently with one cause of action and one right of recovery, whether the facts out of which it arose are found to be in accord with either the plaintiff's or the defendant's version of them. There is, therefore, no ground for the complaint that the trial court submitted to the jury the double question whether the note was accommodation paper; and, if not, and found to have been applied on the contract, whether the latter had been lawfully rescinded for the failure of the defendant to perform, so

that the cause of action to recover back the money paid, remained. And it follows also that the trial court was right in refusing to require plaintiff to elect whether he would proceed upon the theory of an accommodation note or that of a payment on the contract.

But a further objection is taken. The defendant's counsel asked the court to charge that, "If the agreement to pay \$3,000 before the 1st of January was made *at or before* the making of this land contract, and this five hundred dollar note was a payment in pursuance of said agreement, then it was a payment upon the contract." The court declined to charge further than or differently from what it had already charged, and an exception was taken. This refusal is now alleged as error, and upon the ground that, whether the agreement was valid or not, its existence was material upon the question whether the note was in fact given to apply upon such promised payment. But it is apparent that the fact of such an agreement antedating the note in existence when that instrument was made is all that was material for the purpose declared. If such an agreement was in fact made before the note was executed it is of no consequence whether it was concluded before or after the land contract was signed. Now the defendant was allowed to prove and did prove that such an agreement was made at the time the land contract was executed, but after its signature, and also Copley's admissions of that fact. On the other hand, Copley testified that the agreement was conditioned upon his being able to get the money. Both parties conceded that the agreement antedated the note and was in existence when that was made; and the controversy between them respected not its date, but its terms. Now the trial court called the attention of the jury to Conklin's claim of the existence of this agreement and repeated to them his version of what it was, and submitted to them the question whether the note was without consideration or was applied upon the land contract. The defendant got the full benefit of his claim that such an agreement antedated the note; and that was all that was material to characterize the latter transaction. Substantially, the court had already charged the defendant's proposition except as to the date of the agreement. All the parties agree that the

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23 conversation about the advance of the three thousand dollars occurred after the contract was executed. The defendant's witnesses proved that explicitly, and Copley says the same thing. He testifies that it was after the contract was signed, though before a duplicate was made and he got his copy. The court steadily refused to admit evidence of an agreement preceding the contract which varied its terms, and there was no evidence in the case of such an agreement. Indeed, the defendant's counsel expressly claimed that the agreement to advance \$3,000 upon the land contract was "consummated after" that contract was
24 made, although some conversation on the subject preceded it (fol. 91 of case). And the defendant himself so testified. The request to charge, therefore, was properly refused for the double reason that it assumes that the agreement for an earlier payment was made "at or before" the land contract; and also because the material part of the request, that if the note was given in pursuance of that agreement it was a payment upon the contract, had already been substantially charged. Whether the note was so given was expressly submitted to the jury, and they were told
25 that if it was, if Copley made it for the purpose of applying on the contract, then the jury must come to the next question in the case and determine whether the contract was rescinded. There was, therefore, no error in the charge in this respect, and the exclusion of the conversations preceding the contract was defensible for the reason that they were wholly immaterial, since the agreement as to an advance was conceded by the defendant's counsel to have been consummated after the land contract was executed, and he was permitted fully to prove its existence and terms. We think the recovery was right.
26 The judgment should be affirmed with costs.

Roberts v. Ely, 118 N. Y., 128.

ROBERTS v. ELY.

New York Court of Appeals, 1889.

[Reported in 118 N. Y., 128.]

1. Money which the seller of goods collected from insurance, upon destruction of the goods before delivery, and belonging equitably to the buyer,* constitutes a cause of action for money had and received; and the statute of limitations runs accordingly.
2. Whenever one person has money which he cannot conscientiously retain from another, the latter may recover it in this form of action, if the mode of trial, and the relief which can be given in a legal action are adapted to the exigencies of the particular case, and the transaction is capable of adjustment by that procedure, without prejudice to the interests of third persons.
3. Privity of contract is not essential.
4. The action lies irrespective of whether the original possession by defendant was rightful or wrongful.
5. The fact that there was a relation of trust between the parties does not require a resort to equity.
6. Nor does the fact that plaintiff is ignorant of the amount received, and asks an accounting, if the amount depends on simple facts ascertainable as readily in a legal as in an equitable action.†
7. In such a case the limitation applicable to legal causes of action must apply.

This action was against executors.

The features of the complaint essential to the question of pleading may be concisely stated thus :

I. That in the month of, etc. [*about ten years before the commencement of the action*], one G. and plaintiff purchased from the testator 1,611 half chests of tea at the agreed price of \$14,000, said tea then being in the custody of a specified corporation.

II. That about the same time it was agreed between G. and plaintiff and said company, that the company should hold the tea in store for them and insure it for their benefit to the amount of the cost value; that it was subsequently represented to them

* As to who bears the fire risk pending an executory contract, see note in 23 Abb. N. C., 849.

† But an equitable action *may* lie, and the equitable limitation apply, if the complaint shows that defendant was under a fiduciary duty to keep and render accounts. Carr v. Thompson, 87 N. Y., 160; Marvin v. Brooks, 94 *id.*, 71.

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- 3 that it had so insured the tea and rendered them an account charging the premium thereon as paid.

III. That subsequently [*about nine years before suit*] a specified part of the tea was destroyed by fire in the custody of the company.

- IV. That the total value of all the tea destroyed, including that of G. and the plaintiff, and thus insured, was about \$78,000, of which about one-seventh belonged to G. and the plaintiff. That the company settled with the decedent for all the tea destroyed, including the tea of G. and the plaintiff; and he, about 4 eight years before suit, received, by reason of the destruction of their part of the tea, about \$8,000, and was instructed to account therefor to G. and the plaintiff, the exact amount thus paid being unknown to plaintiff.

V. That the testator, instead of paying over to G. and the plaintiff their share of the insurance moneys, wrongfully appropriated it to his own use, in fraud of their rights.

- After alleging death and the appointment of defendants as the executors, and assignment to plaintiff by G. of all his claim, the 5 complaint alleged demand made by him upon the defendants for an accounting and for payment of the sum to be found due.

VI. That the fact of such wrongful appropriation was unknown to plaintiff or G. until a few months before the commencement of the action.

Wherefore plaintiff demanded judgment for an accounting, and that the defendants pay over the amount to be found due with interest from the time the testator received the money.

- 6 The answer set up, among other things, the statute of limitations by alleging "that this action was not commenced within six years after the alleged cause of action alleged in the complaint had accrued."

At the trial the complaint was dismissed.

The Supreme Court at General Term affirmed judgment for defendants, and plaintiff appealed.

The Court of Appeals affirmed the judgment. 7

ANDREWS, J. [*after stating the facts*]: Upon all the circumstances the plaintiff insists that when the insurance money was paid to Ely he took it, impressed with a trust in favor of Geiger & Co. to the extent of their interest in the teas destroyed by the fire, as represented in the fund received, and was equitably bound to account to Geiger & Co. for their equitable interest.

Assuming that the plaintiff is right in his construction of the facts, the case falls within the familiar doctrine that money in the hands of one person, to which another is equitably entitled, may be recovered in a common law action by the equitable owner upon an implied promise arising from the duty of the person in possession to account for and pay over the same to the person beneficially entitled. The action for money had and received to the use of another is the form in which courts of common law enforce the equitable obligation. The scope of this remedy has been gradually extended to embrace many cases which were originally cognizable only in courts of equity. Whenever one person has in his possession money which he cannot conscientiously retain from another, the latter may recover it in this form of action, subject to the restriction that the mode of trial and the relief which can be given in a legal action are adapted to the exigencies of the particular case, and that the transaction is capable of adjustment by that procedure, without prejudice to the interests of third persons. No privity of contract between the parties is required, except that which results from the circumstances. (*Mason v. Waite*, 17 Mass., 560.) The right on the one side, and the correlative duty of the other, create the necessary privity, and justify the implication of a promise by the defendant to do that which justice and equity require. It is immaterial, also, whether the original possession of the money by the defendant was rightful or wrongful. It is sufficient that the duty exists on his part, created by the circumstances, to account for and pay it over to the plaintiff. 8 9 10

Nor is this form of action excluded, because in a general sense there is a relation of trust between the parties arising out of the transaction. There are many cases of trust cognizable only in a court of equity. The cases of express trusts of property are

Roberts v. Ely, 118 N. Y., 128.

- 11 generally of this kind. The duty of the trustee to the *cestui que trust*, to perform the trust and to account according to its terms and conditions, is as a general rule enforceable only in an equitable action. The necessity of taking an account, the frequent complexity of details, the separate and varied interests often affected, and the necessity of molding the relief to suit the circumstances, render the procedure of courts of equity peculiarly suitable in the administration of formal trusts, and in many cases indispensable to the ascertainment and enforcement of the rights and obligations of the parties. But the fact that money in the
- 12 hands of one person is impressed with a trust in favor of another, or that the relation between them has a trust character, does not, *ipso facto*, exclude the jurisdiction of courts of law. The general rule that trusts are cognizable in equity and are enforceable only in an equitable action, is subject to many exceptions, "as, for instance, cases of bailments, and that larger class of cases where the action for money had and received for another's use is maintained *ex aequo et bono*." (Story's Eq. Jur., § 60; Comstock, J., *Lawrence v. Fox*, 20 N. Y., 278.)
- 13 The present case falls within the exception. Upon the plaintiff's theory of the facts, Geiger & Co. were the equitable owners of a *pro rata* part of the insurance money received by Ely. That firm and Ely were alone interested in the question, as it is conceded that Ely was entitled to all the money received, subject only to the claim of Geiger & Co. The only accounting required was such as was necessary to ascertain the extent of the interest of Geiger & Co., and that depended upon simple facts as readily ascertainable in a legal as in an equitable action. The case, therefore, presented a cause of action, upon a liability im-
- 14 plied by law, and it was subject to the limitation of six years, prescribed by section 91 of the Code of Procedure, in force when the cause of action arose. The money was paid to Ely in 1871, and the facts were known to Geiger & Co. at or soon after that date. The action was commenced in 1881. Assuming that an equitable action could be brought to enforce the liability claimed, it would still be subject to the limitation of six years. (*Matter of Neilley*, 95 N. Y., 390.) The plaintiff cannot avoid the application of the statute by treating the actual appropriation

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of the money by Ely in 1874 as the cause of action. The right 15
of Geiger & Co. to recover the money was perfect from the
time of its actual receipt by Ely in 1871. (*Lillie v. Hoyt*, 5 Hill,
395.)

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed.

CHAPMAN v. FORBES.

New York Court of Appeals, 1890.

[Reported in 123 N. Y., 532; rev'g 56 Hun, 646.]

1. An action for money had and received, even when founded upon equitable principles, is an action of a common law nature, and in no respect a suit in equity, whether it depends upon a promise to pay the money to plaintiff or on the fact that the money came to defendant from such source and under such circumstances that in equity he ought to pay it over. ✓
2. The plaintiff in an action of a *common law nature* cannot be compelled upon the defendant's application to bring in, as additional parties defendant, third persons who claim the same moneys from him adversely to plaintiff.

The following statement of the substance of the complaint 1
gives such allegations as are essential to the questions raised :

Plaintiff sued as executor of Aurelia Palmer, who, before her death, had been induced by fraud to part with property of hers, and who, on suing to recover it, had compromised on the payment of \$2,500 to her attorney, one Breen. That the attorney Breen was insolvent and carried off the money, and that Breen's brother assisted or connived in the wrong. That the defendant in the present action, Forbes, acted as counsel for said Breen 2
when the latter was indicted for larceny of the money, and also acted as attorney for Aurelia Palmer, the plaintiff's testatrix, before her death. That by defendant's suggestion and consent, given while so acting as the decedent's attorney, the decedent gave plaintiff a deed of trust of her property, and a full power of attorney to manage all her affairs and collect all claims.

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3 VII. "That after the said Breen [*the former attorney*] was indicted, and prior to plaintiff's appointment as such trustee, and on or about March 1, 1883, the defendant herein received from said Breen [*the former attorney*] either personally or through his said brother [*naming him*] acting for said [*former attorney*] the sum of \$1,200, which said sum was part of the money belonging to the deceased, and converted as aforesaid by said Breen [*the former attorney*] and that said money was paid to and received by the defendant herein, for said deceased, to whom it rightfully belonged."

4 [Then followed allegations in the usual form, of the death, the will and the letters issued to plaintiff.]

X. "That plaintiff has duly demanded the sum of \$1,200 from the defendant, both as her trustee, in conformity with the powers vested in him by said deed of trust and power of attorney above referred to, which authority was known to defendant at the time of said demand, and also as executor prior to the commencement of this suit; but the defendant has refused to pay the same to plaintiff, and still wrongfully, and in fraud of the rights of plaintiff and said deceased, retains the said sum of \$1,200 and the whole thereof."

"WHEREFORE, The plaintiff demands judgment against the defendant for the sum of \$1,200, with interest thereon from March 1, 1883, and costs."

6 The answer of defendant denied the material allegations of receipt to the use of plaintiff's testatrix, and of demand, conversion, etc. It also alleged that he received the money from T. H. Breen, as the money of said T. H. Breen, and held it, as his agent, to be paid over only on the performance, on the decedent's part, of certain conditions imposed by T. H. Breen, which conditions were not performed.

That upon the refusal to perform such conditions defendant, by agreement with T. H. Breen, acquired a lien upon the money for certain services performed by him, and that he still holds and claims such lien against such funds.

That subsequently T. H. Breen made a general assignment of all his property to one Frederick Williams for the benefit of his

creditors, and that Williams now claims such fund and has brought an action, which is now pending against him, for it. 7

Upon the pleadings and an affidavit to the truth of the answer, and a stipulation of William's attorney consenting that he be made a party, defendant moved for an order bringing in Williams as a defendant, under the following section of the Code of Civil Procedure :

§ 452. The court may determine the controversy as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights ; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in. 8

And where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment.

At Special Term the court deemed the action to be of an equitable character, and therefore granted the order. 9

The General Term affirmed the order without opinion.

The Court of Appeals reversed the order, holding it was not, in this case, a discretionary one, and that the court below had no power to make it.

PECKHAM, J. Under the old system of pleading the plaintiff, upon the facts set out in the complaint herein, might have brought his action of assumpsit or of debt.

An action of debt would lie though there was only an implied promise, such as to pay over money had and received by defendant to the use of the plaintiff, though paid to defendant without the command of plaintiff. (3 Comeyn's Digest, Title "Debt"; (A. g.) Implied; 1 Rolle's Abridgement, 597, line 25; 1 Chitty on Plead., 108.) 10

An action of assumpsit as for money had and received would also lie on an implied promise. (1 Chit. on Plead., 99, 100.) There was a slight difference in the form of declaration in the

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- 11 action of assumpsit and that of debt for money had and received. In the former the declaration upon the common count was very brief. It contained among others the allegation that the defendant was indebted to the plaintiff for money had and received, and that in consideration of such debt the defendant *promised* the plaintiff to pay him upon request the sum stated. The expressed promise was averred even though the plaintiff relied only upon an implied promise arising from the circumstances he should prove. But in the action of debt the pleader, although he stated the indebtedness of the defendant precisely
- 12 in the same way as in assumpsit, yet omitted the allegation of a promise on the part of defendant. (1 Chit. on Plead., 341-361.) In neither was it necessary to state the circumstances out of which the debt arose, further than that it was for money had and received by the defendant to the plaintiff's use. *Moses v. Macferlan*, 2 Burr., 1005, 1010, per Lord MANSFIELD.) Judging the complaint in this action by these rules, it would appear to partake more of the character of an action of debt for money had and received by defendant to the plaintiff's use than that of
- 13 assumpsit, because there is nowhere alleged therein a promise by defendant to pay the amount received by him to the plaintiff, and a promise to pay the money is always alleged in the assumpsit action.

Both forms of action were resorted to for the purpose of collecting a debt due from defendant to plaintiff, and such indebtedness was alleged in the declaration in each action. (1 Chit. on Plead., 341-361.) In each case the action was one at law, and yet when brought in either form for money had and received, each depended upon precisely the same equitable rules.

- 14 Whether the action were debt or assumpsit, the plaintiff's case depended upon the question to which party, plaintiff or defendant, does the money *ex aequo et bono* belong? If to the plaintiff, it was because the facts created an indebtedness to him from defendant. In this respect the action has been frequently stated to be an "equitable one," that is one depending upon general principles of equity for the maintenance of the plaintiff's claim to the money. (*Kingston Bank v. Eltinge*, 66 N. Y., 625; 2 Wait Law & Prac. [5th ed.] 391.) It is the most favorable

way in which a defendant can be sued ; he can be liable no 15 further than the money he has received, and against that he may go into every equitable defense upon the general issue ; he may claim every equitable allowance, etc.; in short, he may defend himself by everything which shows that the plaintiff *ex aequo et bono* is not entitled to the whole of his demand or any part of it (Moses v. Macferlan, *supra*, 1012.)

This case is cited with approval in Eddy v. Smith (13 Wend., 488).

The nature of the action was before this court in the recent case of Roberts v. Ely (113 N. Y., 128), and it was therein stated 16 to be a common-law action, although depending upon equitable principles for its maintenance. It was further therein stated that the fact that the money came into the hands of the defendant impressed with a species of trust to repay to the plaintiff, did not alter the character of the action or deprive a court of law of jurisdiction thereof. But although the action may be generally described as one of an equitable character, it never was in any aspect a suit in equity.

And in the particular case before the court there is no such 17 relation of trust between the parties as would render the cause of action cognizable in equity. Equitable relief is not demanded, nor is a case made by the complaint for granting any relief of an equitable nature.

The distinction made by the learned judge at Special Term between an action where the defendant has promised or agreed to pay to the plaintiff the money in controversy, and an action based upon the fact that the money came to defendant from such a source, and under such circumstances that in justice and equity he ought to pay it over to the plaintiffs is not very 18 material. In case assumpsit under the old system had been adopted, such a promise would have been alleged, while, if the action had been debt, the allegation of a promise would have been omitted. But the cause of action in either case would have been the same.

That an action is of an equitable nature does not make it an action in equity.

When, in an action for money had and received, all the facts

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19 show that the plaintiff is *ex aequo et bono* entitled to recover, his right to recover is a legal one and maintainable in a court of law. The action being one at law, there would formerly have been no right on the part of defendant to compel the plaintiff to bring in any other party. If he did not allege a good cause of action against a defendant the latter could demur, and if a good cause of action were alleged, but not proved, the plaintiff would have been either nonsuited or a verdict ordered for the defendant.

20 If the necessary parties were not present the defendant could, by plea in abatement, take advantage of that fact. The judgment for the defendant on such a plea, whether on an issue of fact or of law, was that the plaintiff's "writ be quashed." (1 Chit. on Plead., 466.)

In a suit in equity the rule was different, and in that court all persons who were interested in the question involved in the litigation, and upon whose interest the decree might have any effect, were proper or necessary parties, according to circumstances. (Small v. Attwood, Younge, 458; Pomeroy's Rem. & Rem. Rights, § 488, *et seq.* and cases cited in notes.)

21 In this condition of the practice in the two courts of law and equity the Code of Procedure was adopted, and the material part of section 122 thereof reads as follows: "The court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties the court must cause them to be brought in." The decisions of our courts

22 have been quite uniform that the section above quoted referred to parties in what, under the old practice, would have been suits in equity, and that it was never intended to make it incumbent upon a plaintiff in an action at law to sue any other than the parties he should choose. (Sawyer v. Chambers, 11 Abb. Pr., 110; M'Mahon v. Allen, 12 How. Pr., 39; Webster v. Bond, 9 Hun, 437.) These cases were decided under the old Code, but section 452 of the new Code uses substantially the same language, and adds a further provision which will be noticed hereafter.

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[*The opinion then proceeded to review the cases on the principles by which third persons are brought in ; and held that the rule does not apply in an action of a common law nature.*] 23

All the judges concurred in reversing the order.

NOTE.—In the subsequent case of *Rosenberg v. Salomon*, 144 N. Y., 92, the court held that although *the defendant* in a common law action cannot require the plaintiff to bring in another person, the second clause of § 452 authorizes the court to grant the application *made by the third person to be allowed to come in*. In other words the first of the above paragraphs in § 452 applies only in equity actions, the second applies in all actions

Agnew v. Brooklyn City Railroad Co., 20 Abb. N. C., 235.

AGNEW v. BROOKLYN CITY RAILROAD CO.

Brooklyn City Court, General Term, 1887.

[Reported in 20 Abb. N. C., 235, with note.]

✓ An allegation that defendants' servant, driving their horse-car at a time and place specified, so negligently and carelessly managed his team that the horse knocked her down and injured her leg, is sufficiently definite and certain. To state more information would be to plead evidence.

1 Appeal from an order.

BY THE COURT—VAN WYCK, J. This is an appeal from an order denying a motion to have the complaint made more definite and certain.

The plaintiff, a child of five years, alleges that while she was in the act of crossing Sackett Street, on the cross-walk, the driver of a one-horse street car so negligently and carelessly managed his team, that the horse knocked her down, and injured her leg.

- 2 This is certainly a plain and concise statement of the facts constituting her cause of action, as required by Code Civil Pro., § 481. The defendant insists that under section 546 the Court should compel her to state what act of commission or omission of the driver was negligent. The meaning and application of the allegation are definite and certain; it distinctly states negligence in the management and control of the team, viz.: That the driver brought his horse in contact with this plaintiff when, by the exercise of ordinary care, he could have prevented it.
- 3 Plaintiff could not furnish in her pleadings more information in relation to the fact thus set forth, unless she pleaded the evidence by which she expects to prove this fact. This is never desirable; the form of this complaint is to be commended.

If the defendants make out a case in which they are entitled to the evidence, or parts of it, they ought to appeal to the provisions of the Code allowing the examination of a party before trial, or compelling the party to furnish a bill of particulars [§§ 531, 870].

We see no reason for disturbing the discretion of the court

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below exercised in denying the motion of defendant. (Reardon v. N. Y. C. Co., 50 N. Y. Supr. Ct. [J. & S.], 514.) 4

The order should be affirmed, with \$10 costs and disbursements.

DONNER v. OGILVIE.

New York Supreme Court, First Department, June, 1888.

[Reported in 49 Hun, 229.]

A complaint to charge the lessor of rooms in a tenement house with damages by reason of an injury sustained by a member of the family of the hirer, from the unfit condition of the premises for the use for which it was let, is not sufficient, unless it alleges either that defendants knew or had reason to know the dangerous condition and failed to disclose it, or that they had agreed to repair it and did not, or facts showing that the dangerous structure was such as to be a nuisance, or that it was in a part of the building of which the lessor retained care and control, to be used for the benefit of the tenants generally.

Action for negligence.

The amended complaint was as follows:

ESTHER DONNER, by her Guardian *ad litem*, Alexander Cauldwell

against

CLINTON OGILVIE and Ida M. Ingersoll, individually and as executor and executrix of the last will and testament of William H. Ogilvie, deceased, Benjamin F. Hahn and Henry Schumacher.

Trial desired in the county of New York.

The plaintiff as and for an amended complaint herein alleges upon information and belief, as follows:

I.—That heretofore and prior to the times hereinafter mentioned, William H. Ogilvie died seized of the premises here-

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- 3 inafter mentioned, leaving a last will and testament, which was duly recorded in the office of the Surrogate of the county of New York, on the 3d day of November, 1882, in and by which said last will and testament, the defendants, Clinton Ogilvie and Ida M. Ingersoll, were nominated and appointed as executor and executrix of said will.

II.—That the said defendants, Ogilvie and Ingersoll, were the children of said testator, and his next of kin and heirs-at-law.

- 4 III.—That in and by said will of said testator the premises hereinafter mentioned were devised by said testator to the said defendants, Ogilvie and Ingersoll.

IV.—That on the 3d day of January, 1883, letters testamentary were duly issued by said Surrogate of the county of New York to the defendants, Clinton Ogilvie and Ida M. Ingersoll, as executor and executrix of said last will and testament of William H. Ogilvie, deceased, who respectively duly qualified as such and entered upon the discharge of their duties as such, and continue so to act, and as such, assumed possession and control of the property and assets of the said testator.

- 5 V.—That among other property and assets left by the said testator were the premises known as No. 94 Sheriff street, in the city of New York, consisting of a rear tenement house occupied at the times herein mentioned by a number of tenants, of which said executor and executrix assumed control.

VI.—That thereafter and prior to the 22d day of April, 1887, the said defendants, Ogilvie and Ingersoll, leased the said premises to the defendants, Benjamin F. Hahn and Henry Schumacher, for a term of years.

- 6 VII.—That while the said premises were in the possession of the defendants certain of the rooms thereof were let and rented to Charles Donner, the father of this plaintiff, from month to month, at an agreed compensation or rental, without any covenant on the part of the said Charles Donner to repair said premises.

VIII.—That under said letting and hiring at the times hereinafter mentioned the said rooms were occupied by the parents of the plaintiff, with whom this plaintiff, an infant, under the age of fourteen years, was residing.

IX.—That immediately in front of the rooms so occupied by this plaintiff and her parents, as aforesaid, there was a platform about fourteen feet, more or less, above the ground or yard necessary to be used for ingress and egress to and from the said rooms, and intended for use in connection with said rooms. 7

X.—That at the time of the leasing of the said premises by the defendants, Ogilvie and Ingersoll, to the said defendants, Hahn and Schumacher, the said platform was in the same state and condition as at the time of the accident herein mentioned.

XI.—That the said defendants, in violation and disregard of their duty and of the rights of this plaintiff, wrongfully and negligently failed to properly guard or protect the said platform, and permitted the same to become and remain in an improper, unsafe and dangerous condition; so that this plaintiff, on the 22d day of April, 1887, while in the proper and lawful use of the said rooms and platform, without any fault or contributory negligence on her part or that of her parents, fell from said platform into the yard below, solely because of the negligence of the defendants and the improper, insufficient and negligent manner in which the said platform was constructed, guarded and kept, and its unsafe, improper and dangerous condition. 8 9

XII.—That by reason of the premises this plaintiff sustained severe and, as she is advised and believes, permanent injuries, and became and remained sick for a long period of time, and greatly suffered in body and mind to her damage in the sum of \$15,000.

XIII.—That this plaintiff is an infant under the age of fourteen years, and by order duly made by this court and entered on the 28th day of May, 1887, before the commencement of this action, Alexander Cauldwell was duly appointed guardian *ad litem* of the plaintiff, to commence and prosecute this action. 10

Wherefore, plaintiff demands judgment against the defendants for the sum of \$15,000, with interest thereon, from the 22d day of April, 1887, besides the costs and disbursements of this action.

[*Signature and address of*] Plaintiff's attorney.

The defendants, Ogilvie and Ingersoll, demurred on the ground

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11 that the complaint did not state facts sufficient to constitute a cause of action.

The Supreme Court at Special Term overruled the demurrer and defendants' appeal.

The Supreme Court at General Term reversed the judgment.

BARTLETT, J. The contents of the amended complaint in this action may be summarized as follows: The defendants, Ogilvie and Ingersoll, owned and controlled the premises 94 Sheriff
12 street, in the city of New York, which consisted of a rear tenement house occupied by a number of tenants. Prior to April 22, 1887, they leased these premises to the defendants, Hahn and Schumacher, for a term of years. While the premises were in the possession of the defendants (no particular defendants being specified) certain rooms therein were let and rented to the plaintiff's father from month to month at an agreed rent, without any covenant by the tenant to repair. The rooms were occupied by the parents of the plaintiff, with whom she, being an infant under fourteen years of age, resided. Immediately in front of the
13 rooms was a platform about fourteen feet above the yard, and necessary to be used for ingress and egress to and from the rooms, and intended for use in connection with the rooms. When leased by the defendants Ogilvie and Ingersoll to the defendants, Hahn and Schumacher, the platform was in the same condition as at the time of the accident, which is the subject-matter of the action. The defendants negligently failed to properly guard and protect the platform, and permitted it to become and remain in an improper, unsafe and dangerous condition, so that the plaintiff, on April 22, 1887, while in the proper and lawful use of the
14 rooms and platform, without contributory negligence, fell from the platform into the yard below, solely because of the negligence of the defendants, and the improper, unsafe and negligent manner in which the said platform was constructed, guarded and kept, and its unsafe, improper and dangerous condition. The plaintiff sustained severe and permanent injuries, to her damage \$15,000.

This, I think, is a fair statement of the substance of the complaint. The defendants Ogilvie and Ingersoll have demurred on

the ground that the complaint does not state sufficient facts to 15
constitute a cause of action, and have appealed from an inter-
locutory judgment at Special Term overruling their demurrer.
The first impression gained from reading over the complaint is
that the pleader intended to allege a letting of the entire premises
by the defendants Ogilvie and Ingersoll to the defendants, Hahn
and Schumacher, whereby the former parted entirely with all
control over the property, and that the letting to the plaintiff's
father was by the defendants Hahn and Schumacher alone. But
the learned counsel for the defendants argues that the allegation
in the seventh paragraph, that the premises were in the possession 16
of the "defendants" when the rooms were let to the plaintiff's
father, means that they were in possession of all the defendants,
and hence that all are liable for the condition of the platform
which resulted in the plaintiff's injuries. It might be said in
answer to this that the complaint does not really allege a letting
by any of the defendants, for it does not necessarily follow from
the averment that the defendants were in possession of the
premises when certain rooms were rented, that they themselves
were the parties with whom the tenant made his contract. We 17
will not dispose of the case, however, upon any such refinements,
but will adopt the view most favorable to the plaintiff, which is
that the complaint alleges a letting to the father *by all the*
defendants. Assuming that the father thus stands in the direct
relation of tenant to all the defendants, let us inquire whether
they can be held liable for injuries to his child by reason of the
unsafe, unguarded and dangerous condition of the platform in
front of his rooms at the time of the letting.

It is not charged that the defendants knew, or had reason to
know, the platform to be dangerous for any use for which they 18
let it, and failed to disclose its condition, or that they had agreed
to repair it, or make it safe, and omitted to do so. Hence they
cannot be deemed liable, under the rule which was applied in
Carson v. Godley (26 Penn St., 111), where the defendant let a
storehouse with the knowledge that it was unfit for the uses to
which the lessees manifestly intended to put it, and omitted to
insert any word of caution or restraint in the lease. Nor can the
defendants be regarded as negligent under the authority of

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19 Davenport v. Ruckman (37 N. Y., 568, 574), where it appeared that there was an express agreement by the lessor to put the premises in repair, which agreement had not been kept. Neither do the averments of the complaint suffice to make out such a condition of the platform as to amount to a nuisance for the effects of which the defendants might continue responsible after the letting. A structure may be unguarded and unsafe, and dangerous for the use of a child, and yet not be a nuisance.

20 In Bold v. O'Brien (12 Daly, 160) the landlord of a tenement house was held to be liable for an injury to his tenant arising out of a defect in a portion of the premises outside that occupied by the plaintiff, and over which the landlord retained control; and it is sought to bring this case within the principle of that and other similar decisions. But here it is not alleged that any of the defendants retained control over the platform, and indeed there is a distinct intimation to the contrary in the averment that the structure was immediately in front of the rooms rented to the plaintiff's father, and was intended for use in connection therewith. This would rather imply that the platform was let
21 to him with the apartments.

There appears to be nothing, then, to take the case at bar out of the ordinary rule that no warranty is implied on the part of the lessor of a dwelling that it is safe and convenient. (Jaffe v. Harteau, 56 N. Y., 398.) The law which should control the disposition of this demurrer is stated with such perfect clearness in Edwards v. N. Y. & Harlem R. R. Co. (98 N. Y., 245, 249), that we need only quote a few sentences from that case: "If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which anyone lawfully upon the premises suffers injury, he is responsible for his own negligence to the
22 party injured. If he demises premises, knowing that they are dangerous and unfit for the use for which they were hired, and fails to disclose their condition, he is guilty of negligence which will in many cases impose responsibility upon him. If he creates a nuisance upon his premises and then demises them, he remains liable for the consequences of the nuisance as the creator thereof, and his tenant is also liable for the continuance of the same nuisance. But where the landlord has created no nuisance, and is

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guilty of no wilful wrong or fraud or culpable negligence, no 23
case can be found imposing any liability upon him for any injury
suffered by any person occupying or going upon the premises
during the term of the demise.”

None of the authorities cited by the respondent are in conflict
with this statement of the law, and if they were they would have
to yield to it as the latest utterance of the court of last resort on
the subject.

The interlocutory judgment must be reversed, and the appel-
lants must have judgment on their demurrer, with costs, with 24
leave to the plaintiff to amend on the usual terms.

VAN BRUNT, P. J., and MACOMBER, J., concurred.

Judgment reversed and judgment ordered for appellants on
demurrer, with costs, with leave to plaintiff to amend on usual
terms.

CITY OF BUFFALO v. HOLLOWAY.

New York Court of Appeals, 1852.

[Reported in 7 N. Y., 493.]

1. An allegation that under a contract, the terms or substance of which are 6
not stated, “it became and was the duty of defendant to” do a speci-
fied act is insufficient on demurrer.
2. The facts creating the duty must be alleged.

Action by city of Buffalo against a contractor who had con- 1
structed a sewer for the city, to recover from him a sum which
the city had been compelled to pay to one Tripp, who fell into
the sewer excavation while the work was going on, in conse-
quence of the omission to put up guards.

The complaint did not state the provisions of the contract
under which defendant did the work. Its allegations sufficiently
appear in the opinion.

Defendant demurred for insufficiency of facts to constitute a 2
cause of action.

The Supreme Court at Special Term overruled the demurrer.

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- 3 *The General Term* reversed the judgment and sustained the demurrer.

The Court of Appeals affirmed this latter decision.

JEWETT, J. [*after stating facts, and the general principle that the contractor is not liable to the city in such case unless he stipulated to guard the excavation*]:

- 4 The city of Buffalo was bound to exercise its right in constructing the sewer in a careful and prudent manner, so as to avoid injury resulting to others from it; and if it were prudent and necessary to erect, maintain and keep lights, guards and barriers about, and in the vicinity of the place excavated during the progress of the work, in order to protect and prevent persons lawfully traveling and passing along the street from unavoidably falling into the pit or hole and thereby sustaining injury, it was its duty to do so, and consequently it is liable for injuries occasioned by the want of such proper precautionary measures. As between the city of Buffalo and the defendant, the obligation of the latter extended no farther than to perform his part of the
- 5 contract made for the construction of the sewer according to its terms, with reasonable skill, and consequently, he is only liable to the city to compensate it for such injuries as it sustained for want of the exercise of such skill in the performance of his contract in that manner.

- 6 The complaint states that "for the purpose of constructing the sewer, the defendant excavated the earth in or near the middle of Elk street, near the east end of the bridge on the canal slip, in such manner as to make a deep pit or hole near the east end of the bridge, about twelve feet in length along the middle of the street, of the width of about four feet and of the depth of about fifteen feet, and that it then became and it was the duty of the defendant while the pit or hole remained open, in the use of due care, to have erected and maintained lights, guards and barriers about and in the vicinity of the pit or hole, to prevent and protect persons lawfully traveling and passing in, along and upon Elk street, from and against unavoidably falling therein; that while the pit or hole was open, the defendant wrongfully, carelessly, negligently and improperly left it unguarded, and while

so left, etc., Mr. Tripp, while lawfully passing along and upon 7
Elk street, unavoidably fell into it, by means whereof he was
greatly hurt," etc., and afterwards sued the city of Buffalo for
such injuries and recovered against it a certain sum, etc., there-
for, which the said city had paid, etc.

It will be observed that it is not stated or alleged in the com-
plaint that it was not necessary for the defendant, in order to con-
struct the sewer, in pursuance of the terms of his contract to
excavate the pit or hole in every respect as it was done, or that
there was any lack of skill manifested in executing the contract
in that respect. The complaint, instead of stating facts and cir- 8
cumstances to show that it was the duty of the defendant to erect
and keep up lights, guards and barriers while the pit remained
open, assumes that such was his duty, and proceeds at once to
allege a breach of this duty. The difficulty is, the want of any
statement of facts from which such duty arises. For an allega-
tion of the duty is of no avail, unless from the rest of the com-
plaint the facts necessary to raise the duty can be collected. If
the excavation to construct the sewer in the street in question
was such as to make it necessary and proper to erect lights, 9
guards and barriers in the vicinity to render the passing of the
street safe while open, it unquestionably was the duty of the
city of Buffalo to have caused such precautionary measures to be
taken. The city might have contracted with the defendant to
take such measures; in that event the duty as between him and
the city would have devolved upon him, and he would have been
liable for all the consequences resulting to it for any neglect on
his part in observing his stipulations in that respect; or the city
may have judged the measures unnecessary, and therefore
omitted to provide for them in its contract with the defendant, 10
or if otherwise, the city might have chosen to contract for the
doing of that service with some other person. In either case the
defendant would owe no such duty to the city, whatever liability
he might have incurred to others, who suffered by the digging of
the pit and leaving it open, without such measures having been
taken to guard against the danger which there was in passing in
the street (*Seymour v. Maddox*, 5 Eng. L. & Eq., 265; 1 Chitty
R., 370, edit. 1812 by Day).

Davis v. N. Y., Lake Erie & Western R. R. Co., 20 Abb. N. C., 280.

- 11 The complaint should contain a plain, concise statement of the facts constituting a cause of action (Code, § 142). In my opinion the complaint in this case comes short of that. The defendant was at liberty, by § 144 of the Code, to demur to it when it appeared upon its face that it did not state facts sufficient to constitute a cause of action. The judgment, therefore, should be affirmed.

DAVIS v. N. Y., LAKE ERIE & WESTERN R. R. CO.

Buffalo Superior Court, January Term, 1886.

[Reported in 20 Abb. N. C., 280; again in 110 N. Y., 646.]

1. Under an allegation that the locomotive, by the explosion of which plaintiff was injured, was not safe and proper, by reason of which he suffered the said injuries, evidence that the coal furnished was unfit and could not be used with safety upon this locomotive is not competent, although it appears also that by a different construction such unfit coal might have been safely used, and that good coal would have been used on this locomotive with safety.
 2. The particular in which the defendants were guilty of negligence of its duty toward the plaintiff is necessarily alleged, and defendant has a right to rely upon such particular as the only one involved in the issue to be tried.
 3. In an action for negligence an amendment which assigns as the particular cause of the casualty a different defect in structure or materials from that specified in the original complaint is not the introduction of the new cause of action.
- 1 *First.*—Appeal from a judgment and order refusing a new trial.
- Plaintiff sued for damages for injuries suffered by him while in the defendants' employment as locomotive engineer.
- The complaint alleged that the defendant so negligently, carelessly and unskillfully conducted its business that it failed to supply the plaintiff with suitable and safe appliances for the conduct of its business, and failed to keep the same in repair, as
- 2 was proper and necessary to do, to secure the safety of said plaintiff, "that said defendant was negligent and careless in that behalf as alleged, in this, that while the said plaintiff was engaged in the discharge of his duties as engineer, the defendant failed

to furnish a safe and proper locomotive engine with which to do 3
said work, but that the said locomotive so furnished plaintiff was
out of repair, defective, insecure and dangerous to persons
upon it * * by reason of which defective condition and lack
of repair, the said plaintiff, while engaged in the performance of
his duty, was hurled violently out of the window of the cab of
the said locomotive by an explosion of gas in the fire-box of said
locomotive, upon the ground, and received thereby severe and
permanent injuries."

The plaintiff testified on the trial that while he was at work 4
with his engine, hauling a train of freight cars, his engine "blew
out and got stopped up; she blew fire, gas and smoke out into
the cab, and blew me out on to the ground," and that thereby
his leg was broken, and he suffered the injuries complained of.
He further testified that the netting over the smoke-stack of the
engine got stopped up; and that caused the engine to blow out;
that he had not examined the netting, but that he knew that it
was liable to get stopped up, and that the netting was used upon
the smoke-stack of all engines to prevent fire and sparks from
escaping, and burning property along the line of the railroad. 5

He did not testify to any defect in the engine, or any want of
repair thereof which caused the injury.

After proving the nature and extent of his injuries, the plaintiff
called as a witness, one Stephens, who, at the time of the
accident, was employed by defendants as an engineer upon one
of its locomotives, and who, having testified that he was familiar
with the kind of coal in use by defendants at the time in question,
was asked by plaintiff's counsel what kind of coal it was.

The defendants' counsel objected to the question as irrelevant 6
and immaterial, and because the complaint contained no allegation
that the fuel furnished for use by plaintiff on his engine was
improper, or of a defective quality. The objections were over-
ruled, and the witness was allowed to testify to the quality and
kind of coal used on plaintiff's engine.

He was asked by plaintiff's counsel how the coal was, as to
being screened or dirty, and mixed with foreign substances.
Defendants' counsel objected to the question as immaterial and
irrelevant, and because the complaint contained no allegation

Davis v. N. Y., Lake Erie & Western R. R. Co., 20 Abb. N. C., 280.

- 7 that the fuel furnished for use on plaintiff's locomotive was improper, or of defective quality. The objection was overruled, and the witness answered that the coal was not screened; that the netting used on the engine had the same sized meshes as the netting in general use on defendants' locomotives; that he had had experience of the danger of using that kind of netting with that kind of coal. He further testified, under similar objection by defendants' counsel, that the netting that was used on defendants' road, in connection with the kind of coal that was used, was not a safe and suitable instrumentality to do business with
- 8 upon the engine used by plaintiff; that if a larger netting was used with that kind of coal, there would be no difficulty; and that if with the netting used on that engine, a better quality of coal were used, there would be no difficulty.

- Several other witnesses called by the plaintiff, who had been employed by defendants upon its locomotives, were allowed to testify, under defendants' objection, that the quality of the coal used on defendants' engine was defective and bad, unsafe and unfit for use with the netting used on defendants' engines;
- 9 though they also testified that it was a standard netting in use upon all the defendants' engines, and on those of other railroad companies, and that it was a safe and proper netting if a good quality of coal was used upon the engine.

No testimony was given that would warrant the conclusion that there was any defect in the netting of the engine run by plaintiff if the coal furnished him for use thereon had been of good quality and fit for such use.

- At the trial*, plaintiff had a verdict, and judgment having been
- 10 entered, an order denying a motion for a new trial having been also made, defendants appealed.

SMITH, Ch. J. [*after stating the facts*]: It is entirely clear to my mind that the court erred in permitting the plaintiff to prove that the coal furnished for use upon his engine was of bad quality, and unsafe and unfit for such use. As we have seen, the complaint contained no allegation touching the kind or quality of fuel furnished plaintiff. On the contrary, the complaint alleges that the engine furnished to plaintiff was out of

repair, defective, insecure and dangerous, by reason of which ¹¹ the plaintiff suffered the injuries complained of. On the trial the plaintiff attempted to prove that the netting upon his engine was defective, insecure and dangerous. He could only prove that when coal not screened, dirty, and of a kind and quality unfit for use was employed, the netting was unsafe and defective, but his own witnesses testified that the netting was safe and proper for use with a good quality of coal. When, therefore, the court allowed the plaintiff to abandon the charge in the complaint, that the engine was defective and unsafe, and to prove instead ¹² that the fuel used on the engine was of a bad quality, that it could not be used with safety upon an engine properly constructed and in good condition, he compelled the defendants to meet an issue not made by the pleadings, and which it did not come into court to try; and the jury were allowed by the admission of this improper evidence to find a verdict for the plaintiff, because the fuel furnished him was not of good quality, but was unfit and unsafe for use upon his engine.

If the complaint had not specified in what particular the defendants were guilty of negligence, or failure to do its duty ¹³ towards the plaintiff, it would have been deemed defective, and the plaintiff could have been compelled to state in his complaint specifically the negligence or neglect of duty which caused the injury for which he sued. And in stating the facts requisite to make his complaint sufficient in this respect, he was bound to state them truly, so that the defendants might know with what fault or wrong they were charged, and come to the trial prepared to meet the charge. The very object of written pleadings is to frame the issues so that the parties may know what questions are to be tried, and make preparation therefor; and this purpose is ¹⁴ frustrated and manifest injustice is done if, on the trial, the party is allowed to abandon the issues deliberately framed, and substitute other and different ones. The defendants, no doubt, were bound to furnish the plaintiff a safe and proper kind of coal to use upon his engine; and had the complaint contained proper allegations on that subject, either originally or by proper amendments, a verdict based upon those allegations, and suitable proofs supporting them, would not be disturbed.

Davis v. N. Y., Lake Erie & Western R. R. Co., 20 Abb. N. C., 230.

- 15 I have not considered other questions made by defendant in this case, because the error of the court in permitting evidence to be given to support an issue first raised on the trial, renders it necessary to grant a new trial, upon which, with amended pleadings, or otherwise, those questions may not arise.

The judgment and order appealed from should be reversed, and a new trial granted, costs to abide the event.

Second.—Appeal from an order allowing an amendment after trial and order for new trial.

- 16 The plaintiff then applied at *Special Term* for leave to amend the complaint.

The substantial allegations of the proposed *amended complaint* were as follows:

- That the plaintiff is a resident of the city of Buffalo, county and state aforesaid, and on or about the 25th of July, 1881, was in the employ of said defendant, upon one of defendant's engines, as an engineer, in the city of Buffalo, and that it was the duty of the defendant to supply the said plaintiff with suitable
17 and safe means, materials and appliances for the conduct of the business in its ordinary run, and for any extraordinary occasions that may be reasonably anticipated, and keep the same in repair.

- That yet the defendant, not regarding its duty in that regard, so negligently, carelessly and unskillfully conducted the said business that it failed to supply the said plaintiff with suitable and safe means, materials and appliances in the conduct of said business, and failed to keep the appliances in repair, as was proper and necessary to do to secure the safety of said plaintiff, of which the said plaintiff was ignorant, but of which the said
18 defendant had due and timely notice.

That the said defendant was negligent and careless in that behalf as alleged, in this, that while on the day and place aforesaid, the said plaintiff was engaged in the discharge of his duties as engineer, the defendant failed to furnish a safe and proper locomotive engine with which to do said work; but that the said locomotive so furnished plaintiff was out of repair, defective, insecure and dangerous to persons upon it; and also the defendant failed to furnish proper means and materials and fuel for use

on said engine, but furnished means and materials and fuel for 19 use on said engine which were unfit and unsafe and dangerous to those upon the said engine; all of which was well known to the defendant, but unknown to this plaintiff, and by reason of which defective condition, and lack of repair, and the said use of the unsafe and unfit and dangerous means, materials and fuel so furnished by the defendant as aforesaid, an explosion of gas was caused in the fire-box of said locomotive, by means of which the said plaintiff, while engaged in the performance of his duty, was hurled violently out of the window of the cab of the said locomotive, upon the ground, and received thereby severe and 20 permanent injuries.

The Special Term of the Superior Court allowed the amendment, on the ground that no new cause of action was thereby set up.

The General Term of the Superior Court affirmed the order made at Special Term on the same ground.

The Court of Appeals affirmed the order of the General 21 Term.

EARL, J. These allegations did not constitute a new cause of action; the plaintiff still based his right to recover upon the same injury caused to him at the same time and place by the wrong of the defendant, and all that was added in the amended complaint were additional specifications of the same wrong. The plaintiff, when he framed his original complaint, may have been mistaken as to the cause of the effects from which he suffered the injury, but he was not mistaken as to his cause of 22 action.

It is a fair test, to determine whether a new cause of action is alleged in the amended complaint, that a recovery had upon the original complaint would have been a bar to any recovery under the amended complaint. If the plaintiff had, however, been beaten or nonsuited upon a trial under the original complaint, because of the insufficiency of the allegations therein contained, the judgment entered would not have barred a recovery under the amended complaint, because the judgment in such a case

Ehrgott v. Mayor, etc., of N. Y., 96 N. Y., 265.

23 would not have passed against the plaintiff upon the merits. There is no doubt that the court may, at Special Term, allow an amendment of a complaint by introducing therein even a cause of action barred by the statute of limitations. But in such case the defendant must not be deprived of his defense of the statute.

As the court had power, in the exercise of its discretion, to allow this amendment, we have no jurisdiction to review its discretion, and this appeal should, therefore, be dismissed, with costs.

All the judges concurred.

Appeal dismissed.

EHRGOTT v. MAYOR, ETC., OF NEW YORK.

New York Court of Appeals, 1884.

[Reported in 96 N. Y., 265.]

1. A general allegation of great bodily injury and consequent continuing disability, lets in evidence of any particular, such as resulting disease of the spine.
2. If not deemed enough to inform defendant, his remedy is by motion to make definite and certain, or for particulars.

1 Action for negligence.

Plaintiff had a verdict at the trial.

The Supreme Court at General Term reversed the judgment.

The Court of Appeals reversed the General Term's decision, and gave judgment for plaintiff. On the question of pleading, EARL, J., said: "Upon the trial, plaintiff gave evidence tending to show that he had a disease of the spine of a permanent nature as the result of his injuries. This evidence was objected to by
2 the counsel for the city, on the ground, that the plaintiff had not alleged such a result from the injury in his complaint.

"We think the complaint is sufficient. It alleges that he suffered great bodily injury; that he became, and still continues to be sick, sore and disabled; that he was obliged to spend large sums in attempting to cure himself, and was prevented for a long time from attending to his business, and that he was other-

Gumb v. 23d St. R. R. Co., 114 N. Y., 411.

wise injured, to his damage \$25,000. These allegations are sufficient to authorize proof of any bodily injury resulting from the accident, and if the defendant desired that they should be more definite, it could have moved to have them made more specific, or for a bill of particulars.” 3

[*The rest of the opinion was not in relation to questions of pleading.*]

All the judges concurred.

Order reversed and judgment affirmed.

GUMB v. TWENTY-THIRD ST. R. R. CO.

New York Court of Appeals, 1889.

[Reported in 114 N. Y., 411.]

1. Under a general allegation only such damages as necessarily and immediately flow from the injury can be proved.
2. The fact that in consequence of the personal injuries alleged, plaintiff was obliged to expend money in hiring others to carry on his business, is special damages, and must be specially alleged.

Action for negligence. 1

Plaintiff had a verdict.

The Superior Court at General Term affirmed the judgment.

The Court of Appeals reversed the judgment. On the question of pleading, FOLLETT, J., delivering the opinion of the court, said: “The plaintiff was permitted to testify, over defendant’s objection, that the evidence was not within the issue; that while suffering from his injury he employed two men to work in his place, paying them \$12 and \$15 per week each, \$135 in the aggregate. When a plaintiff alleges that his person has been injured and proves the allegation, the law implies damages, and he may recover such as necessarily and immediately flow from the injury (which are called general damages) under a general allegation that damages were sustained; but if he seeks to recover damages for consequences which do not necessarily and immediately flow from the injury (which are called special damages), he must allege the special damages which he seeks to recover. It 2

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- 3 is not alleged in the complaint that the plaintiff expended money in hiring others to work in his place; the defendant had no opportunity of contradicting the evidence, and its reception was error. *Gilligan v. N. Y. & Harlem R. R. Co.*, 1 E. D. Smith, 453; *Stevens v. Rodger*, 25 Hun, 54; *Whitney v. Hitchcock*, 4 Denio, 461; 2 *Thompson on Negligence*, 1250, §§ 32, 33; 2 *Sedg. on Dam.*, 7th ed., 606; 1 *Chitty's Pl.*, 16th Am. ed., 411, 515; *Mayne on Damages*, chap. 17; *Heard's Civil Pl.* 310-314.

For this and other errors the judgment was reversed.

All the judges concurred except BRADLEY, J., dissenting.

FISHER v. RANKIN.

*New York Supreme Court, First Department, General Term,
December, 1889.*

(Reported in 25 Abb. N. C., 191.)

- o 1. A complaint for damages for personal injuries occasioned by the negligence and carelessness of defendant in failing to keep a sidewalk in safe and proper condition, will not sustain a recovery on the ground that defendant unlawfully interfered with the previous condition of such sidewalk, rendering it unsafe and a public nuisance.*
 - 2. An amendment changing a complaint for negligence to one for the creation of a nuisance, entirely changes the ground of action, and will not be allowed on the trial, nor subsequently upon the argument of an appeal.
- 1 Re-argument of an appeal by defendant from a judgment in favor of plaintiff entered upon a verdict.

DANIELS, J. The appeal in this action has already been heard and decided by this General Term, but upon an application made by the defendant a re-argument has been ordered. This direction for the re-hearing of the appeal proceeded to some extent upon the case of *Wasson v. Pettit*, 49 Hun, 166. The appeal has been again argued pursuant to this direction, and the point taken in support of it has now been made mainly dependent upon the construction to be placed upon the complaint in the action.

* As to stating same injury in several forms as separate causes of action, see 24 Abb. N. C., 326.

It was for a personal injury sustained by the plaintiff in falling 3
upon the sidewalk on Forty-eighth street in front of premises
owned by the defendant. This walk had been excavated to
receive a concrete filling, and then to be covered by an asphalt
or other smooth surface.

The plaintiff was passing along the walk on July 15, 1884,
and stepped upon that which had been excavated, and upon
which a rough surface of cinders, ashes and broken stone had
been placed. In endeavoring to pass along this part of the walk
she fell and received severe injuries. The court in submitting 4
the case to the jury placed the plaintiff's right to maintain the
action wholly upon the question whether, under the defendant's
authority or employment, an unlawful excavation had been made
in the sidewalk rendering it unsafe for use and substantially a
public nuisance. Her right to maintain the action was in no
respect made dependent upon the finding of fact by the jury
that the defendant was chargeable with negligence for the con-
dition in which this part of the walk had been placed. Upon
that subject the charge was that it was not a case in which the
jury could take into account the subject of negligence at all; but 5
that it depended upon the unlawful interference of the defend-
ant with the previous condition of the walk. The defendant
excepted to the submission of the case in this form to the jury,
and claimed that without amending the pleadings they could not
proceed on that theory.

Whether this exception was well taken depends wholly upon
the construction to be placed upon the complaint, for no state-
ment or admission contained in the defendant's answer enlarged
the scope of the action as the complaint had been made to
describe it. By the complaint it was stated that the defendant 6
was the owner of the premises where the injury took place, and
that the plaintiff was lawfully passing along the sidewalk in
front of the premises, and that while in the act of passing as
aforesaid she stepped upon a flag-stone placed on said sidewalk,
when the said stone suddenly gave way from under her feet, and
the plaintiff was thereby violently precipitated to the ground.
Then it is stated that from her fall she had received the injuries
for which remuneration was demanded in the action. And after

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7 that the complaint proceeded and stated: that the said injuries were caused wholly by the carelessness and negligence of the defendant, in that, among other things, he failed to keep the said sidewalk in a safe and proper condition, but on the contrary permitted it to be and remain in an unsafe and dangerous state and condition, all of which the defendant well knew or ought to have known.

8 That this plaintiff did not, through any fault or negligence on her part, contribute to the said injuries. There was no statement or averment whatever that the defendant had unlawfully made or authorized the excavation in the sidewalk. But what he was charged with having done were acts and omissions which in judgment of law were careless or negligent, and no facts whatever were stated in the complaint characterizing what had been done as an unlawful interference with the surface or any other part of the sidewalk.

9 It is plainly evident that the cause of action set forth in the complaint depended wholly upon the charge made against the defendant that this unsafe condition of the walk had been brought about wholly by his carelessness and negligence. And that presented a case entirely different from the case which the court in this manner submitted to the jury. A very manifest distinction in the law, as well as the facts, exists between the case stated in the complaint and that upon which the right of the plaintiff was made to depend in this submission of the action.

10 In *Dickinson v. Mayor, etc.*, 92 N. Y., 584, this distinction was clearly maintained. For it was there said as to that case that "this was not an averment for keeping, maintaining and suffering a nuisance, but merely for negligence in not removing the ice and snow. The complaint was not for a positive wrong committed by the defendant, but for an injury sustained by reason of defendant's negligence. The authorities establish a distinction between an action for wrong and an action for negligence." (*Id.*, 588.) And under a complaint alleging one cause of action, the plaintiff is clearly disabled by this principle from recovering for another not mentioned or referred to in any manner in the pleading. If she could recover at all, her right to do so was restricted to the case contained in her complaint.

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(*Stevens v. Mayor, etc.*, 84 N. Y. 296, 305; *Day v. Town of New Lots*, 107 *Id.*, 148, 154–5; *Neudecker v. Kohlberg*, 81 *Id.*, 296, 305.) That she did not do in this case as it was submitted to the jury, and the exception taken by the defendant is well founded.

It has been urged by the plaintiff's counsel that this may be obviated by so amending the complaint as to make it conformable to the theory of the case on which it was submitted to the jury. But an amendment or change of that description cannot be made upon the trial, or after the trial upon the argument of an appeal. For the effect of that would be to change the action¹² from one cause to another and different ground of action. And such a change cannot be, under the authorities, made to support the judgment from which an appeal had been taken. (*Davis v. N. Y., Lake Erie, etc., R. R. Co.*, 110 N. Y., 646.)

In this respect the amendment or change would not be supported by anything which was said in *Harris v. Tumbidge*, 83 N. Y., 92. For it was there conceded that a new cause of action could not be introduced into the case by an amendment either at the trial or upon an appeal. The only manner in which the error in the submission of the case can be corrected is by a new trial, and for that reason the judgment and order should be reversed and a new trial ordered, with costs to the appellant to abide the event.¹³

VAN BRUNT, P. J., and BARRETT, J., concurred.

LAMMING v. GALUSHA.

New York Court of Appeals, October, 1892.

[Reported in 135 N. Y., 239.]

1. In an action for an injunction and damages as relief against the unauthorized use of a highway by a railroad company, the plaintiff may unite with this cause of action for a nuisance a demand for damages for a personal injury to himself by a passing train.
2. Continuous injuries to plaintiff's real property by the maintenance of a nuisance, and injuries to his person on a single particular occasion caused by the same nuisance, may be joined in one action, for they are transactions connected with the same subject of action.

The elements of the complaint were as follows :

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- 1 Plaintiff was owner of premises on the Ridge Road and of half of the bed of the road :

The road, a highway on which he had an easement of free passage :

For several years defendants had unlawfully maintained a steam railroad along said road, and upon plaintiff's said premises :

The track was so laid as to hinder vehicles, and upon an embankment unlawfully made for the purpose :

Resulting obstruction of the highway by mud, water and snow :

- 2 Plaintiff frequently thereby compelled, in coming and going, to turn into the fields, and to perform labor and incur expense in getting to and fro :

His access to his premises from the highway rendered difficult and dangerous :

Defendants customarily ran trains at a high, dangerous, and unnecessary rate of speed ; engines customarily emitting large clouds of smoke, burning cinders and steam, and making frightful noises :

- 3 And defendants frequently stopped unusually long trains, extending in front of plaintiff's premises, cutting off his access.

The part of the complaint on which the decision turned was as follows :

- 4 "That on or about the 4th day of August, 1888, plaintiff, in the ordinary prosecution of his said business, was riding along said North avenue in his own market or produce wagon, and driving his own horse attached thereto, and going toward the north ; that said horse was a quiet and well trained animal, accustomed to steam railroads and cars, and that plaintiff was driving with due care ; that plaintiff had reached a point about midway between Norton street and the Ridge road ; that thereupon one of said locomotive engines and trains, operated by defendants, approached from the south, running at a high rate of speed and making alarming noises with the escape of steam and otherwise, and without abatement of said speed or noises, ran past plaintiff ; that the approach of said train greatly frightened said horse, and, as said train passed, said horse got beyond plaintiff's control, and turned quickly, overturned said wagon

and threw plaintiff violently out of said wagon and to the ground; that said horse, in his fright and struggle to escape, stepped upon plaintiff's head, shoulder and the lower part of his body, wounding and bruising plaintiff." [*Here followed details of his physical injuries.*]

The complaint then went on to show: That defendants intend to continue such wrongful maintenance of the road and operation of trains:

Plaintiff thereby in addition to the bodily injuries described has been totally excluded (with excepted periods) from more than one-third of his easement, and the residue has been greatly impaired; he has been hindered in getting to market; sale of sand, etc., been lessened, house endangered, value of premises diminished, and family put in fear, to his damage already suffered \$10,000:

That the aforesaid acts constitute a nuisance of special injury to plaintiff, that there is no adequate remedy at law, and that without injunction he could only be relieved by a multiplicity of actions, the special injury is irreparable, will increase, and damages cannot be adequate.

WHEREFORE, an injunction and \$10,000, or such other sum as it may appear he is entitled to down to the time of trial, is demanded.

Defendants demurred, assigning misjoinder of action for damages by wrongful entry, with action for injury to personal property, and action for injury to person, and an action to abate a nuisance.

At Special Term, ADAMS, J., overruled the demurrer on substantially the same grounds as explained in the opinion of the Court of Appeals hereinafter given.

The Court at General Term reversed the judgment on the ground that the complaint appeared to present a cause of action for negligence causing injury to the person, with a cause of action for relief from a continuing nuisance.

Plaintiff appealed.

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- 9 *The Court of Appeals* reversed the decision of the General Term.

ANDREWS, J. The question presented by the demurrer is whether in an action for maintaining a nuisance in constructing and operating a steam railroad in a public highway without authority, brought by the owner of lands injuriously affected by the road, and whose property rights are invaded thereby, in which the plaintiff demands relief by way of injunction and special damages to his real property, occasioned by the nuisance, he may claim in the same action damages for a personal injury
10 sustained from the operation of the road, without negligence on his part, from being thrown from a wagon while driving along the highway on which the railroad was constructed, in consequence of his horses being frightened by the noise of a passing engine and train, and escaping from his control.

The demurrer is for an alleged misjoinder of these causes of action. The allegations in the complaint relating to the personal injury are not separated from the other allegations therein relating to the injury to the real property, so as in form to constitute
11 a separate cause of action, but are blended with them. But a defendant is not deprived of the right to demur to a complaint for misjoinder of causes of action distinct in themselves, and which cannot be united because they are not separately stated or numbered. (*Golding v. Utley*, 60 N. Y., 427.) It is well settled that any unauthorized and continuous obstruction to a public highway constitutes a public nuisance (*DENIO, J., Davis v. Mayor*, etc., 14 N. Y., 524), and an action for damages lies in favor of any person sustaining a special injury in his person or property therefrom against the party who erected or maintained it. There
12 can be no doubt that the plaintiff could have brought an ordinary legal action for damages for personal injury based upon the allegations in the complaint. The complaint contains no allegation of negligence on the part of the defendants in the operation or management of the train at the time of the alleged injury. Nor was this necessary. Negligence of the defendant is not ordinarily an essential element in an action for damages sustained by reason of a nuisance. The action is founded on the wrongful act in creating or maintaining it, and the negligence of the defendant,

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unless in exceptional cases, is not material. (*Congreve v. Smith*, 13 18 N. Y., 82; *Clifford v. Dam*, 81 *id.*, 56. The General Term seems to have been under a misapprehension in supposing that the complaint set out a cause of action for the physical injury of the plaintiff, based on negligence. This was not the gravamen of the complaint.) The complaint alleges the unlawful obstruction of the highway, and then follows an enumeration of the injuries sustained by the plaintiff to his real property by reason of the nuisance, and of the physical injury, stating time, place and circumstances. If the sole cause of action was the personal injury, the plaintiff would be confined to the ordinary action for damages and could not maintain a claim for equitable relief by injunction. In that case the legal remedy for the wrong suffered by the plaintiff would be complete and adequate. An action by a private person to restrain the continuance of a public nuisance will only lie when the nuisance and the injury suffered are continuous, affecting the value of his property or the exercise of his personal rights, or impairing his health and comfort in connection with the enjoyment of property. In such case to prevent multiplicity of actions and to give final relief, he may invoke the equitable power of the court. But the possibility that a traveler injured on the highway by a railroad train unlawfully thereon may, on some future occasion, be subjected to a similar injury, does not entitle him to maintain an action for an injunction. But the question here is whether a plaintiff having a cause of action which entitles him to an injunction restraining the maintenance and operation of the railroad by reason of its continuous interference with his rights of property may unite with the demand for equitable relief by injunction and for damages for such interference, a claim for damages for a personal injury suffered on a particular occasion from the same wrongful appropriation and use of the highway; or in other words, whether he may unite in a single action all his claims, legal and equitable, which arise in consequence of the same general cause, viz., the nuisance maintained by the defendant. This is a question of procedure governed by the course and practice of the court, or by the statute, if made the subject of statute regulation.

We are of opinion that the causes of action were properly

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17 united under § 484 of the Code of Civil Procedure, which authorizes the plaintiff to unite in his complaint two or more causes of action, whether such as were formerly denominated legal or equitable, or both, in the cases specified, and among others: "Sub. 9. Upon claims arising out of the same transaction or transactions connected with the same subject of action and not included within one of the foregoing subdivisions." The subject of the action in this case was the injury committed by the defendants in maintaining a public nuisance which subjected the plaintiff to injuries specified, viz.: injury to real property
18 and personal injury. The injuries were distinct in character, and while the injury to the real property was continuous, a physical injury was consummated when first inflicted. But they both proceeded in a general sense from the same wrong, the unlawful obstruction of the highway by the defendant, and they were all, we think, "transactions connected with the same subject of action" within the meaning of § 483, and may properly be redressed in a single action. This conclusion is in harmony with the general principle of equity jurisprudence, which aims
19 at complete and final relief in a single action in respect of all matters between the same parties, growing out of the same general transaction. It is supported by the significant language of the court in *Chapman v. City of Rochester* (110 N. Y., 276), which was an action to restrain the pollution of a stream and for damages. Danforth, J., said: "Moreover the plaintiff is found to have sustained a special injury to his health and property from the same cause, and we find no reason to doubt that he is entitled not only to compensation for damages thereby occasioned, but also to such judgment as will prevent the further perpetration
20 of the wrong complained of." (See also *Shepard v. Man. R'way Co.*, 117 N. Y., 442.) These views lead to a reversal of the judgment of the General Term and an affirmance of the judgment of the Special Term, with costs.

All the judges concurred.

NOTE ON THE DISTINCTION IN PLEADING,
BETWEEN NEGLIGENCE, NUISANCE,
AND WILLFUL ACT.

[From 25 Abb. N. C., 195.] At common law, in an action on the case 1
for damages, the question whether the pleader regarded the cause of action as negligence or nuisance was deemed of very little importance, if any, so far as concerns the ground of recovery at the trial (See *Panton v. Holland*, 17 Johns., 92; *Adsit v. Brady*, 4 Hill, 630); and the distinction is not much explained in the books. But under the Code it frequently confronts the practitioner.

The importance of this distinction, which cost the plaintiff his verdict in the case in the text, is enhanced by several practical considerations.

I. *The Limitation.*—First, the period fixed by the statute of limitations within which to bring actions for negligence may differ from that fixed for nuisance or willful act. 2

Code Civ. Pro., § 383, subd. 5, provides that an action for a *personal injury*, resulting from negligence, shall be commenced within three years after the cause of action has accrued.

Code Civ. Pro., § 382, subd. 3, provides that an action for an *injury to property* shall be commenced within six years after the cause of action has accrued.

This distinction, made by the general statute of limitations, turns on the thing injured, rather than on the cause of injury, although it is true that in the one the ground is more commonly damage by negligence, and that in case of nuisance the damages are more commonly to property. 3

But the short limitation of actions against cities in this state of over 50,000 inhabitants (L. 1888, c. 801) is confined to personal actions for negligence. 24 Abb. N. C., 293. The short limitation of actions against villages, however, for personal injuries is not confined to those for negligence. L. 1889, p. 608, c. 440.

(See *Webber v. Herkimer, etc. Street Ry. Co.* (1888), 109 N. Y., 311; s. c. 15 State Rep., 262, where a carrier's liability for an injury to a passenger was held barred by the limitation for negligence, even though the action be in form on contract.

And compare *Maxson v. Del., L. & W. Ry. Co.* (1889), 112 N. Y., 559; s. c. 21 State Rep., 787.) 4

It may perhaps be a question which limitation applies when the structure or business is lawful, but becomes a nuisance by defendant's negligence in managing it.

II. *Notice or demand before suit.*—Besides the familiar rule that as against the mere continuer of a nuisance created by others notice is necessary, it is important to observe that statutes in this state require presentation of claim to certain municipalities as a preliminary to some actions founded on negligence, but do not require it in those founded on a nuisance.

Note on the Distinction between Negligence, Nuisance, etc.

- 5 Frankel v. City of New York, 18 State Rep., 241; s. c. 2 N. Y. Supp., 294. Here, on the question of the necessity of the presentation of a claim to the city before suit, it was urged on behalf of the plaintiff that the action was not for negligence, but for damages caused by the existence of a nuisance; and that, therefore, the act of 1886 could not apply, as in terms it is limited to actions arising from negligence. PATTERSON, J., said: "The complaint does not sustain this contention. It is not charged that the alleged nuisance was created by the city, or its officers or employees, but that the city negligently suffered it to remain after notice of its existence. The city is not liable for injuries caused by obstructions placed in the highway by third parties until after notice, actual or constructive. Hume v. Mayor, etc., 47 N. Y., 639. Upon such notice being
- 6 given, it becomes the duty of the city to remove the obstruction, or cause it to be removed. Failure to do this is negligence. As against the other defendants, a cause of action is set forth, based upon a placing of a nuisance in the highway. Their liability arises independently of negligence. Congreve v. Smith, 18 N. Y., 79; Congreve v. Morgan, *id.*, 84; Irvine v. Wood, 51 *id.*, 224. But as to the city it would be responsible on the theory of its negligence."

III. *Legal or equitable relief*.—The remedy afforded for injuries inflicted by negligence does not, as does that for nuisance often and for willful acts sometimes, include equitable relief. The only remedy for negligence is damages recoverable in an action of a legal nature. Nuisance is relieved against, also, in a common law action for abatement and in an equitable

7 action for damages, injunction, or abatement, or all, as the case may be.

IV. *Right of trial by jury*.—As a consequence there is a somewhat obscured distinction as to the right of trial by jury. An action for negligence is always thus triable as matter of right. An action for nuisance, if framed as an equitable action, is not within the constitutional right of trial by jury. Compare Parker v. Laney, 1 Supm. Ct. (T. & C.), 590; rev'd in 58 N. Y., 469; Hubbard v. Russell, 24 Barb., 404; Brown v. Woodworth, 5 *id.*, 550; Waggoner v. Jermain, 3 Den., 306; Van Bergen v. Van Bergen, 2 Johns., Ch. 272; Peck v. Elder, 2 Sandf., 129 n; Neward v. Lee, 3 Sandf., 281; Ellsworth v. Putnam, 16 Barb., 565; Cornes v. Harris, 1 N. Y., 223. The right is given by statute in this state (Code Civ. Pro., § 968) in actions

8 "for a nuisance," without any express qualification. But the courts construe this clause as applicable only to the actions for such relief as might have been had at common law; and if the action is framed for an injunction, a jury trial is no more matter of right than it was before the Code. Cogswell v. N. Y. & New Haven R. R. Co., 105 N. Y., 819 (engine-house adjoining a city residence); Olmsted v. Rich, 6 N. Y. Supp., 826 (keeping bees).

V. *Contributory negligence*.—The defence available in an action for negligence, that the plaintiff's negligence concurred in producing the injury complained of is not available in an action for a willful wrong.

VI. *Tests of the distinction between the causes of action*.—There are many cases in which the practitioner may well pause to consider whether

I. *Causes of Action at Law.* (3) Torts:—Negligence. 215

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he should allege negligence or nuisance. The owner of a house opens the street to lay his water pipes or construct his coal hole, and omits to guard and light the excavation; should the gist of an action for an injury sustained by a passer-by, be nuisance or negligence? Is the pleader bound under the doctrine of the case in the text to indicate his theory of the action? Is it not enough that he state the facts as held in *Lafin Rand Powder Co. v. Tierney* (Ill.), 23 Northeast Rep., 389, or must he choose his ground in the law also, and commit himself to it in the complaint? The city builds a sewer which discharges sewage directly on plaintiff's lot. Must plaintiff indicate in his pleading whether he claims for negligence, as *Hardy v. City of Brooklyn*, 90 N. Y., 435, or nuisance or for trespass, as in *Seifert v. City of Brooklyn*, 101 N. Y., 136; aff'g 15 Abb. N. C., 97; and *Chapman v. City of Rochester*, 109 N. Y., 301; aff'g 23 Weekly Dig., 424. 9
(Compare *Ehrgott v. Mayor, etc.*, of N. Y., 96 N. Y., 264; rev'g 66 How. Pr., 161, *Cohen v. Mayor, etc.*, of N. Y., 113 N. Y., 532; *Vogel v. Mayor, etc.*, of N. Y., 92 N. Y., 10). 10

Or is the delict of the owner a nuisance, and that of the municipality in not removing it negligence? (Compare *People ex rel. Bentley v. Mayor, etc.*, 18 Abb. N. C., 123—where mandamus was issued to compel the authorities to remove a sidewalk obstruction because it was a nuisance—with *Kuntz v. City of Troy*, 104 N. Y., 344, where the city was held liable for negligence to a person injured by such an obstruction.)

May the same cause of injury be a nuisance considered as a cause of action against the creator of it, and only negligence as a cause of action against one who neglected the duty of interfering to remove it? If so an excavation in the highway may require the action against the maker of it to be for nuisance, but an action against the highway officer having funds, or the town or city, to be for negligence. 11

In *Cleveland (City of) v. King*, 132 U. S., 295, the Supreme Court of the United States cut across this distinction, putting the recovery against a municipal corporation for injury caused by an obstruction created by private individuals, upon the ground of liability for negligence; but citing as authority *Cardington v. Frederic*, 46 Ohio, where it was held that such an action was "an action for a nuisance."

Dickenson v. Mayor, etc., of N. Y., 92 N. Y., 534; aff'g 28 Hun, 254, accords with the language of the Supreme Court in *Cleveland v. King*, above cited. 12

Some minor distinctions are traceable, which may aid sometimes in determining these questions. The term nuisance implies something of continuity, persistence of conduct, or permanence of position or structure. The shock of a single blast by a contractor using too heavy a charge would be regarded as negligence; the jar of a continuity of shocks caused by a steam engine too heavy for the building makes the running of the engine a nuisance. A single shriek of a locomotive whistle if injurious, is actionable on the ground of negligence, if at all. The customary and habitual shrieking in a crowded city is actionable as a nuisance. The same distinction is observable in respect to willful wrong. A single aspersion may

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- 13 be slander; habitual aspersion, whether slanderous or not, may be a nuisance, as constituting a common scold.

It is not strange that writers on nuisance have declared the word to be undefinable, so shadowy is the border-land between these several classes of wrongs. But a careful examination of the representative cases cited below will justify us in saying that the word as now used in the law may be justly defined as a continuing use of property or course of conduct, which, even if it would be rightful were the act done an isolated one, is by reason of the proximity of others, a violation of the duty of good neighborhood, no matter whether it be careful, negligent or willful.

- It will aid in solving such questions as these to consider what are the essential elements in each cause of action. Actionable negligence consists in the omission to fulfil a duty of care. The complaint must allege 14 facts which show that defendant was under a duty to take some degree of care in view of danger to plaintiff's property or person; and that he or his servants failed to do so to plaintiff's injury. If this be shown, intent is not material except on the question of damages. The right of recovery exists whether the omission was inadvertent or willful, or whether it was inadvertent on the part of the employer and willful on the part of the servant. It is true that some authorities have held that if willfulness is alleged there can be no recovery for negligence; but the better opinion is that if facts showing an omission of due care be alleged and proved the addition of an unproved allegation of willfulness does not vitiate.

- Nuisance on the other hand is a use of property or a course of conduct 15 which violates a duty of good neighborhood; and negligence and willfulness are alike immaterial, unless it may be on the question of damages. A bone boiling establishment in a remote and isolated place is rightful; but if the town of residences grows out to it, it may be a duty of good neighborhood to cease the use of the place for such offensive work; and the fact that the owner is as careful as possible, and has no intent to injure others will not justify the continuance of a process which proximity has made noxious to the community.

- The law of negligence is growing up out of the increasing duty of care upon all persons in the increasingly crowded communities and increasingly dangerous instrumentalities of modern times. The law of nuisance 16 is growing up out of the increasing necessary restrictions on otherwise lawful conduct and uses of property in such community. Negligence usually consists in the manner of doing a thing, whether the thing in itself be lawful or unlawful. Nuisance consists in the thing itself considered in its proximity to other persons, whether the manner of it be careful or careless.

VII. *Examination to enable to frame complaint.*—For the right to examine defendant, to enable plaintiff to frame his complaint, see 2 Abb. New Pr. & F., 419.

VIII. *Amending at the trial.*—The doctrine of the text that these are different causes of action precludes amending from one to the other at the trial.

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But if one is sufficiently alleged, other allegations connected therewith 17
and not necessary to that cause of action, but appropriate and even sufficient to establish another cause of action, may be allowed to be struck out at the trial.

Thus in an action for nuisance allegations of a trespass may be got rid of.

And in action for negligence allegations of willful wrong may be dropped.

For cases selected for their aptness in illustrating some of these distinctions, see 25 Abb. N. C., 199.

REINING v. CITY OF BUFFALO.

New York Court of Appeals, 1886.

[Reported in 102 N. Y., 808.]

The complaint in an action against the city of Buffalo must contain an allegation of the previous presentation of the claim declared on, to the Common Council, and that forty days had expired since such presentation.

The provision of the charter that no action against the city shall be brought until that time has elapsed since such presentation, creates a condition precedent to the commencement of an action, and makes the presentation and lapse of time a part of the cause of action.*

The Legislature have power to impose such a condition.

Compliance with this condition must be alleged and proved.

Action for damages caused by change of grade.

The allegations of the complaint were: 1

That the defendant, the city of Buffalo, is a municipal corporation, duly organized, created and existing under and by virtue of an act of the Legislature of the State of New York, entitled "An Act to Revise the Charter of the City of Buffalo," passed April 28, 1870, and the various acts amendatory thereof; and that the defendant, the New York, Lackawanna & Western Railway Company, is a corporation duly organized and existing under the laws of the State of New York as a railroad corporation, and as such 2
is engaged in constructing and operating a railroad in the city of Buffalo.

That Commercial and Water streets and Maiden Lane, herein-

* See note on the effect of statutes prohibiting the bringing of an action except upon the performance of some condition, such as demand presentation of claim, or audit, in 24 Abb., N. C., 292.

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- 3 after mentioned, are and for many years past have been public streets, duly created, laid out and existing in the city of Buffalo; and that it is the duty of the defendant, the city of Buffalo, under the said act of incorporation and the various acts amendatory thereof, "to prevent and abate all nuisances" in said city, "to prevent encroachments upon projections over, injury to or the encumbering of the streets, alleys and public grounds," of said city, "and to abate all nuisances therein;" and that for such purposes and the performance of such duty, in and by such act of incorporation and the various acts amendatory thereof, it is given full power and authority.

4 That for many years last past the plaintiffs have been, and that they now are, the owners in fee of the following described premises, situate in said city, that is to say: [*Description of premises.*]

- That within the last four months the defendant, the New York, Lackawanna & Western Railway Company, acting with the consent and authority of the defendant, the city of Buffalo, given by and through its Common Council, on or about the
- 5 the thirteenth day of February, 1882, has entered upon the Commercial and Water streets aforesaid, the said being paved streets of said city, and unlawfully torn up the pavements therein, and constructed in the same a rampart or embankment of earth and stone of about the height of eight feet, supported in its place by a wall of masonry; which rampart or embankment occupies about three-fourths of the entire carriageway, in and along the entire front of the plaintiff's property aforesaid, and reduces the width of such carriageway in and along the entire front of the plaintiffs' premises aforesaid to the width of about ten feet,
- 6 narrowing the same so much that it is impossible for wagons and vehicles of the size commonly used upon the streets of said city to pass one another on said streets in front of the plaintiffs' premises aforesaid, when traveling in opposite directions.

That the plaintiffs' premises aforesaid are situate in one of the busiest portions of said city, and that for many years past, while the plaintiffs have been the owners thereof, the same have been occupied by a large and valuable four-story brick building, used by the plaintiffs as a store and dwelling house, and that they

have carried on therein for many years the business of selling groceries and provisions and other goods; and that such business, until the construction of such rampart or embankment, was large and profitable to the plaintiffs; and that since the construction of such rampart or embankment, and in consequence thereof, the business aforesaid has been greatly injured, diminished and rendered much less profitable than before. 7

That by reason of the construction of such rampart or embankment aforesaid, not only is the passage of people in wagons and other vehicles in front of the plaintiffs' premises aforesaid obstructed and interfered with, but the sidewalks in front of the same are thereby rendered liable to be blocked up and encumbered in the winter season by snow drifting into the space between such rampart or embankment and the plaintiffs' building aforesaid. 8

That prior to the construction of such rampart or embankment, the plaintiffs' premises aforesaid were of the value of twenty-five thousand dollars and upwards, and by reason of such construction they have been reduced in value at least twenty thousand dollars. 9

The plaintiffs further state that such rampart or embankment so constructed in said streets constitutes and is an encroachment and incumbrance thereon, and a nuisance; that the plaintiffs are the owners of the fee of said streets as far as from the front of their premises aforesaid to the outer line of said street; and that the defendant, the New York, Lackawanna & Western Railway Company, in the construction of said rampart or embankment, has taken the same for the purpose of its railroad, without any proceeding for the condemnation thereof, and without paying to the plaintiffs any compensation therefor. 10

And the plaintiffs further state that since the construction of said rampart or embankment in said streets and the obstruction of and encroachment thereon, in consequence thereof, the defendant, the city of Buffalo, has failed to remove the same or to attempt such removal.

WHEREFORE the plaintiffs claim judgment against the defendants for the sum of twenty thousand dollars and interest thereon from the date hereof, besides the costs of this action.

Reining v. City of Buffalo, 102 N. Y., 308.

- 11 Defendant demurred on the ground that the complaint did not allege presentation of the claim, and that forty days had expired before suit brought.

The *Court below* granted judgment for defendant on the demurrer.

The *General Term* affirmed it without opinion.

The *Court of Appeals* affirmed the judgment.

- RUGER, Ch. J.: The sole question presented by this appeal is
12 whether the complaint, in an action against the city of Buffalo, should contain an allegation of the previous presentation of the claim declared on to its Common Council, and that forty days had expired since such presentation. The clause of the city charter requiring such a proceeding reads as follows: "No action to recover or enforce any claim against the city shall be brought until the expiration of forty days after the claim shall have been presented to the Common Council in the manner and form provided." (§ 7, tit. 3, chap. 519, Laws of 1870.)

- 13 The inquiry is whether this provision was intended to operate as a condition precedent to the commencement of an action, or simply to furnish a defense to the city in case of an omission to make such demand. We think the plain language of the statute excludes any doubt on the subject.

- It absolutely forbids the prosecution of any action until the proper demand has been made. It attaches to all actions whatsoever, and by force of the statute becomes an essential part of the cause of action, to be alleged and proved as any other material fact. It does not purport to give the city a defense
14 dependent upon an election to use it, but expressly forbids the institution of any suit until the preliminary requirements have been complied with. The plain intent of the requirement was to protect the city from the costs, trouble and annoyance of legal proceedings, unless after a full and fair opportunity to investigate and pay the claim, if deemed best, they declined to do so.

It is not in such a case necessary that a thing required should constitute one of the elements of a common law action, for if the Legislature have made even a step in their remedy a condition of its prosecution, it is essential not only that it should be

taken, but that it should be affirmatively alleged and proved 15
by the plaintiff. It is competent for them to attach a
condition to the maintenance of a common law action as
well as one created by statute, and, when they have done
so, its averment and proof cannot safely be omitted. The
Court, in *Nagel v. City of Buffalo* (34 Hun, 1), in considering
the statute in question, seemed to think its requirement
was in the nature of a condition subsequent or proviso,
having no necessary connection with the proper statement of a
cause of action, but we think they erred in their conception of
the nature of the provision. Neither its language or object is 16
analogous to those provisions authorizing the defense of the
statute of limitation, or other special and particular defenses
constituting conditions subsequent, which may or may not occur
in particular cases, and must, therefore, be averred to authorize
the court to take cognizance of them. Here the requirement
exists, independent of proof, in every case, and is made to
precede the institution of any suit whatever. Its performance
cannot for any purpose be presumed, but must, to be availed of,
be alleged and proved. The language is "that no action" 17
"shall be brought" until, etc., and constitutes an express prohibi-
tion against the action, until performance of the condition. A
non-compliance with this requirement can be raised by the
defendant, at any stage of the action, when it is called upon to
act in the case.

The general rules of pleading applying to such cases are
elementary and hardly need citations to illustrate them.

It was said by Judge Denio in *Howland v. Edmonds* (24
N. Y., 307): "If the defendant's liability depends upon the per-
formance of a condition precedent, it is very plain that no action 18
will lie until it be performed, and a request or demand of the
thing claimed may and frequently does constitute such a condi-
tion to the obligation of the defendant. When that is the case,
such demand before suit brought must be averred and proved to
enable the plaintiff to maintain the action." The rule is also
illustrated by the decision in *Graham v. Scripture* (26 How. Pr.
501), where, in an action upon a judgment, which was prohibited
by statute, except upon leave of the court first had, it was held

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- 19 that the allegation of such leave must be averred and proved by the plaintiff. It was held in *Taylor v. Mayor, etc.* (83 N. Y., 625), that a similar provision in the charter of New York constituted a condition to the maintenance of an action against the city, although in that case it was also held that it did not in terms apply to the use of a claim by way of set-off, or recoupment in an action brought by the city against the claimant. The case of *Porter v. Kingsbury* is analogous to the case in hand. There suit was brought upon an undertaking on appeal which the statute directs shall "not be maintained" until ten days
- 20 after service of notice of the entry of judgment of affirmance upon the appellant. It was held that performance of the requirement was a condition precedent and must be alleged in the complaint. (§ 1309, Code of Civ. Pro.; *Porter v. Kingsbury*, 5 Hun, 597; affirmed 71 N. Y., 588.) There the act required to be performed constituted no part of the cause of action, but was provided, as in this case, to shield the parties liable from cost and trouble in case of their willingness to pay the claim without suit, after notice given. It is immaterial whether a condition be
- 21 imposed in the statute giving a right of action, or be provided by contract, or exists by force of some principle of common or statute law, the complaint must, by the settled rules of pleading, state every fact essential to the cause of action as well as those necessary to give the court jurisdiction to entertain the particular proceeding.

The dicta in *Minick v. Troy* (83 N. Y., 514, 516) with reference to a similar requirement, that it was necessary for the plaintiff to "show in the first instance that the claim for which the action was brought was presented to the comptroller,"

22 accords with these views, and is further supported by the case of *Fisher v. Mayor, etc.*, (67 N. Y., 73), where the liability arose under the statute authorizing the city to acquire lands by right of eminent domain. The act there provided for compensation by the city, and authorized suit to be brought therefor upon an award, and "after application first made to the mayor," etc., "for payment." It was held that this requirement constituted a condition precedent to the maintenance of an action. The liability to pay in that case existed by force of the Constitution,

Mayor, etc., of New York v. Dimmick, 20 Abb. N. C., 15.

and the statute only regulated the method by which the amount was to be determined, and the mode of enforcing payment thereof. The case does not in principle seem to be distinguishable from that under discussion.

We also referred to a number of decisions in the courts of our sister states upon statutes quite similar to that of the Buffalo charter, in which the want of an allegation of presentation and demand has been held demurrable. (*Jones v. Minneapolis*, 31 Minn. 230; *Benware v. Pine Valley*, 53 Wis., 527; *Maddox v. Randolph Co.*, 65 Ga., 216; *Marshall Co. v. Jackson Co.*, 36 Ala., 24613.) We agree with the conclusions reached in those cases.

The judgment appealed from should be affirmed.

All the judges concurred.

Judgment affirmed.

MAYOR, ETC., OF NEW YORK v. DIMMICK.

N. Y. Supreme Court, Special Term, 1887.

[Reported in 20 Abb. N. C., 15.]

1. A municipal corporation may maintain an action against a property owner for damages sustained by reason of being compelled to pay a judgment recovered against it for an injury caused by the defective condition of the street, such defect being due to the negligence of the property owner*.
2. A complaint by the city against the property owner, alleging that the person injured commenced an action against the plaintiff, and recovered a judgment; and that the injuries for which the judgment was obtained were caused by the negligent act of the defendant, is sufficient, on demurrer although it does not allege all the facts which would justify a recovery by the person injured against the city, such as notice to the city of the defect.†

Demurrer to the complaint for insufficiency.

1

*The generally accepted theory of these actions by the one liable *per infortuniam* to recover over from the one liable by his own fault is subrogation, that is to say, that they are actions for tort, in which the recovery against plaintiff is the measure of damages, rather than actions on constructive contract for money paid to his use. See *City of Rochester v. Campbell*, 123 N. Y., 405; rev'g 55 Hun, 188. Compare *Bailey v. Bussing*, 28 Conn., 455, and *Bank of Utica v. Childs* 6 Cow., 238, and note in 30 Abb. N. C., 180.

†The question of the effect of the former judgment as evidence is or may be a quite different question. See *City of Cohoes v. Morrison*, 42 Hun, 216.

The former judgment may be conclusive in its own favor in the second action, so far as it establishes the liability of the city, but it does not necessarily conclusively establish the liability of the present defendant, although he had notice to defend.

Mayor, etc. of New York v. Dimmick, 20 Abb. N. C., 15.

- 2 The complaint alleged that the defendant had negligently allowed a conductor pipe on a house owned and managed by him to become and remain out of repair, so that the water gathered therein, was poured upon the sidewalk, both from the spout and leaks in that part of the pipe which was attached to the house; that in February, 1885, the water, so poured upon the walk, became frozen and rendered the highway uneven and dangerous; that by reason of the unsafe condition of the walk, one Koerner suffered injuries, for which he recovered damages from the city in a suit brought in the Supreme Court; that the
- 3 city incurred certain expenses in the defence of said action; that payment of the judgment and expenses was demanded but refused; and the relief demanded was for the amount of the said judgment and the amount expended by the city in said action.

The defendant demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action.

- 4 INGRAHAM, J. The facts alleged in the complaint and admitted by the demurrer establish that the defendant maintained a nuisance in the public street of the city of New York, and that, in consequence of such wrongful act, plaintiff sustained damage by being compelled to pay a judgment recovered against it by one Koerner, and for the amount of such damages the complaint demands judgment.

- In *Village of Port Jervis v. First National Bank* (96 N. Y., 550, 555; aff'g 31 Hun, 107), it was held, that "this liability grows out of the affirmative act of the defendant, and renders
- 5 him liable not only to the party injured, but also immediately liable to any party who has been damnified by his neglect. Liability in such case is predicated upon the negligent character of the act which caused the injury, and the general principle of law which makes a party responsible for the consequences of his wrongful conduct."

The foundation of the liability, therefore, depends upon the wrongful act of the defendant. If in consequence of his negligence the street became unsafe, he would be responsible to any

Hawxhurst v. Mayor, etc., of New York, 15 Abb. N. C., 181.

person injured, whether the city had notice of the unsafe condition of the street or not. The plaintiff stands in the position of having been compelled to pay the damages caused by the wrongful act of the defendant; and, having been compelled to pay such damages, it asks to recover from the person whose wrongful act caused the injury the amount that it has been compelled to pay; and the wrongdoer cannot complain because the complaint does not allege all the facts that would justify a recovery against the plaintiff so long as the complaint alleges the facts that show that the defendant is liable for the injuries for which the plaintiff was made liable. 6 7

The allegation that the person injured commenced an action against the plaintiff and recovered a judgment, and that the injuries for which the judgment was obtained were caused by the negligent act of the defendant, is sufficient.

Plaintiff should, therefore, have judgment on the demurrer, with costs, with leave to the defendant to withdraw the demurrer and answer within twenty days on payment of costs.

HAWXHURST v. MAYOR, ETC., OF NEW YORK.

New York Supreme Court, Special Term, 1885.

[Reported in 15 Abb. N. C., 181.]

Where two municipalities are jointly chargeable with the duty of maintaining a bridge or highway, an action will lie against either on an allegation of the joint duty and joint negligence. v

Demurrer to complaint, on the ground of a defect of parties defendant.

This action was brought against the Mayor, Aldermen and Commonalty of the city of New York to recover damages for an injury sustained by the plaintiff, in consequence of a defect in the bridge known as Williams bridge, which it was the joint duty of the city and of the county of Westchester to maintain. 1

The contents of the complaint are fully stated in the opinion.

Hawxhurst v. Mayor, etc., of New York, 15 Abb. N. C., 181.

- 2 LAWRENCE, J. It is too well settled to be a question that, for a personal injury occasioned by the negligence of several persons, there is a separate liability as well as a joint one, and that the person injured may at his election sue both or either of the wrongdoers.

- 3 In this case it is alleged that the defendants were jointly with certain other parties charged and chargeable with the duty of maintaining, rebuilding, repairing and caring for a certain bridge, known as Williams bridge, across the river Bronx, which in part forms one of the boundaries of said city of New York, and of keeping the said bridge and the approaches thereto in a good and safe condition.

- 4 That in the latter part of the year 1881, the defendants, in discharge of the aforesaid duty, jointly with said other parties, caused said bridge to be repaired and rebuilt, and in so doing caused the flooring and timbers of said bridge to be removed, and the said bridge and its approaches otherwise made unsafe and unfit for passage, and were there charged and chargeable with the duty of erecting and maintaining in the said public street,
5 road and highway, at the said approaches to said bridge, suitable and sufficient barricades, lights, etc., so that persons lawfully passing over said public street, road and highway, in the night time, might be warned of the unsafe condition of the bridge and its approaches. That the defendants, jointly with said other parties, wholly failed in the said last mentioned duty, and, on or about December 24, 1881, negligently and carelessly suffered and allowed the said bridge and the easterly approach thereto, to be and remain wholly open and unprotected and without any barricade, light, etc., for the warning or protection of travelers, as aforesaid. That the plaintiff, in the evening of December 24, 1881, in the night time, was lawfully passing along said public street, road or highway, into the city of New York, from the county of Westchester, in entire ignorance that said bridge or its approaches were in any other than a perfectly safe condition, and open and suitable and safe for travel, and by reason of the said negligence of the defendants, the plaintiff, without any fault or negligence on his part whatsoever, fell off and over the said easterly abutment of said bridge, etc., and was thereby

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greatly damaged. The defendants demur on the ground that there is a defect of parties defendant, in that the parties alleged in paragraph second of the said complaint to be jointly chargeable with the defendants with the duty of maintaining the bridge therein referred to, are not made parties to the action. 6

I am of the opinion that the demurrer should be overruled.

The duty of the city of New York to maintain and keep in repair the bridge in question jointly with the county of Westchester, is imposed by Chapter 163, of the Laws of 1880, which provides that the public bridges over the Bronx river, between the city and county of New York and the county of Westchester, which are now built or which may hereafter be built, shall be built and maintained and kept in repair by the said city and county of New York and the county of Westchester, and the expense of building or repairing any of said bridges shall be a joint charge upon the city and county of New York and the county of Westchester. It will be perceived from the allegation of the complaint, that the work of repairing had been entered upon by the defendants jointly with other parties, and that the alleged accident to the plaintiff arose from the negligent performance of that duty. I find nothing which takes this case out of the operation of the general principle laid down in the cases heretofore cited, and the numerous other cases to the same effect, which are to be found in the books. Assuming that both the authorities of Westchester county and the authorities of the city of New York were guilty of negligence, they were either jointly or severally liable at the option of the injured party. In the language of Allen, J., in *Barrett v. Third Ave. R. R. Co.* (45 N. Y., 631): "If both were negligent in a manner and to a degree contributing to the result, they are jointly and severally liable." 7 8 9

I have examined the cases referred to by the learned counsel to the corporation, and do not think there is anything contained in them which should induce me to hold that this case should not be disposed of upon the authority of the cases heretofore cited. The case of *Theall v. Yonkers* (21 Hun, 265, 267), is cited by the counsel to the corporation in support of the demurrer. But that case, which was a case in relation to a bridge be-

Hawxhurst v. Mayor, etc., of New York, 15 Abb. N. C., 181.

10 tween the city (formerly town) of Yonkers and the town of East Chester, was disposed of upon two grounds, the first of which was, that if it was the defendant's duty to keep the bridge in repair, the evidence showed and the referee had found that the defendant was not chargeable with any notice of the defect in the bridge which caused the accident. The second point was that, under the Act of 1841, Chapter 225, as amended by the Laws of 1857, ch. 383, the city and town were jointly liable, and such liability could only be enforced by action against the members of the Common Council of Yonkers and the Commissioners
11 of Highways of East Chester, jointly. It is plain from an examination of the case, that the decision of the second point was not necessary for the adjudication of the rights of the parties, the case having already been disposed of in favor of the defendant upon the first point. If, however, that case is to be regarded as going to the extent which is claimed by the counsel to the corporation, it seems to me to be opposed to the decisions of the court of last resort already referred to, and upon that point I cannot follow it as an authority.

The demurrer will, therefore, be overruled.

BERNEY v. DREXEL.

New York Supreme Court, First Department, 1884.

[Reported in 33 Hun, 34; affirmed in 33 Hun, 419.]

1. In an action by the residuary legatees of a testator dying domiciled in France, for the conversion by defendants of property possessed by him at his death, an allegation "that, under and by virtue of the laws of France," the title to the property in question vested immediately upon testator's decease in the plaintiffs, is an allegation of title as a fact, not as a legal conclusion, and sufficiently shows ownership in plaintiffs.
2. Even if an allegation that by the will, etc., defendants "had legal notice of the illegality and invalidity of the title of the defendants' assignor" to the property, be a mere conclusion of law, and insufficient as an allegation of notice, so that proof of demand and refusal would be necessary to maintain the action—yet, if followed by an allegation that the defendants have converted the property to their own use, the conversion is sufficiently alleged as against demurrer; for under the latter allegation plaintiffs have a right to prove a demand and refusal or other facts to show an actual conversion.
3. Pleadings are not now to be strictly construed against the pleader; and allegations which sufficiently point out the nature of the pleader's claim are sufficient on demurrer, if, under them, he would have a right on the trial to give all evidence necessary to establish the claim.
4. The provision of Code Civ. Pro., § 488—making a misjoinder of parties plaintiff a distinct ground of demurrer,—and § 490—requiring a demurrer to distinctly specify the objection or ground of demurrer, and a demurrer for misjoinder of parties plaintiff (and for two other grounds) to point out specifically the defect relied on,—an objection that one of the plaintiffs has no right of action can no longer be taken under a demurrer merely for not stating facts sufficient to constitute a cause of action.
5. To raise such objection, the demurrer must be for misjoinder of plaintiffs, and specify the plaintiff who, as defendant contends, has no cause of action.

Action for conversion.

The allegations of the complaint were:

First.—That on or about the second day of November, 1864, Robert Berney, who was then domiciled and resided in Paris, made his last will and testament, bearing date on that day, executed at Croydon, in England, in conformity with the laws

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2 of Great Britain, being in the words and figures following, to wit :

[*Here followed a copy of the will and of a codicil.*]

The second paragraph stated testator's death and the relationships of the plaintiffs to him and added :

3 That the said Robert Berney left him surviving no nephews or nieces, children of his said brother and sisters, except the plaintiffs above named, and John Berney and James Berney, children of the testator's brother, James Berney, both of whom have since died intestate, without issue, and that all said plaintiffs are of the age of twenty-five years, and upwards.

4 *Third.*—The plaintiffs further show, that under and by virtue of the laws of France, where the testator had his domicile, the title to all the personal property of which said testator was possessed at the time of his decease, vested immediately thereafter in the plaintiffs other than the plaintiff Louise Berney, and in said John Berney and James Berney, Jr. (both of whom are now deceased), the residuary legatees named in said will, their title being subject, however, to the payment of the particular legacies by said will bequeathed and of the annuities therein given ; and that upon the death of the said John Berney and James Berney, Jr., their interest in said property vested in their surviving brothers and sister.

5 *Fourth.*—The plaintiffs further show, that Messier St. James, whose full name is Felix Amedee, Messier Collet de St. James, one of the executors named in said will, who was domiciled and resided in Paris, being well aware that the title to the property of which Robert Berney died possessed, was, by the laws of France, vested in the plaintiffs as aforesaid, procured James Berney, another of the executors named in said will, to apply for the probate of said will and codicil in Montgomery county, in the state of Alabama, although the said Robert Berney was not domiciled in Alabama at the time of his decease, and never had been domiciled in that state, nor a resident thereof, and although he had left no property therein, and although the said court had no jurisdiction whatever in the premises, the said court, nevertheless, assumed such jurisdiction, induced thereto by some con-

trivance of the said Messier de St. James and James Berney, and thereupon granted probate of said will and codicil, and issued letters testamentary thereupon to the said James Berney. 6

And the plaintiffs further show that, acting under the said illegal and invalid letters testamentary, and in pursuance of the said arrangement previously contrived by the said Messier de St. James, the said James Berney sent to him, the said St. James, a power of attorney purporting to empower him to sell any property belonging to the estate. That said power of attorney was executed by the said James Berney in the city of New York, only four days after the said will was offered for and admitted to probate, and letters testamentary issued by the Probate Court of Montgomery county, Alabama. 7

And the plaintiffs show that the said St. James, acting under the said pretended power of attorney, authorized Cazade, Crooks & Reynaud, of the city of New York, to take all the necessary steps to cause the Secretary of the Treasury of the United States to transfer to bearer, or alter from nominal bonds and scrips into bonds and scrip payable to bearer, certain bonds and scrips of the United States funded loan of 1881, standing registered on the books of the Treasury Department in the name of said Robert Berney, and which formed part of his estate at the time of his death. That said bonds were twenty-two in number, and of the par value (in the aggregate) of \$200,000, four of said bonds, numbered respectively. [*Here followed the numbers and denominations*]. 8

That said bonds at the time of the death of Robert Berney were in his possession in the city of Paris, but that after his death the said Messier de St. James in some way acquired possession of said bonds in said city of Paris and transmitted the same, with the said illegal and invalid power of attorney, to the said Cazade, Crooks & Reynaud, who, acting under said power, on or about the 22d day of June, 1875, assumed to sell and deliver the said bonds to the defendants, trading in the city of New York under the firm of Drexel, Morgan & Co. That said sale was without the written or other consent of the testator's widow, Louise Berney, and without her knowledge. 9

That all the particular legacies given by said will had been

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10 paid prior to such sale, and the sale was not necessary to carry out any of the provisions of the will, nor were the proceeds of sale applied to any such purpose, but the same were misappropriated by the said St. James to his own use.

And the plaintiffs are informed and believe that by the said will and codicil, and the several powers of attorney hereinbefore mentioned (copies of which are annexed), marked, respectively, Exhibits A and B, the said defendants had legal notice of the limitations on the power of sale, and of the illegal and invalid character of the title to said bonds assigned by said Cazade,
11 Crooks & Reynaud.

The plaintiffs further show that the defendants had converted the said bonds to their own use, and that the same were of the value of two hundred and sixty thousand dollars.

WHEREFORE, the plaintiffs demand judgment against the defendants, and each of them, for the sum of two hundred and sixty thousand dollars, with interest from the twenty-second day of June, 1875, besides the costs of this action, which is to be tried in New York county.

12 Defendants demurred on the following grounds:

1. That the plaintiffs have not legal capacity to sue, for that they are not the executors or trustees of the will of Robert Berney in the complaint mentioned, and have at no time acquired by or from said executors or trustees, by assignment or otherwise, any right to or ownership of the United States bonds in the complaint mentioned, and also for that, by the terms of said will, annuities were given to one Eliza Ozier, the plaintiff, Louise Berney, and a certain countess of Perregaux, during their
13 respective lives, and his estate charged with the payment thereof, and it does not appear that the said annuities have been satisfied.

2. That there is a defect of parties defendant in that James Berney and the said Eliza Ozier and Countess of Perregaux are not made parties defendant.

3. That the complaint does not state facts sufficient to constitute a cause of action.

The *Supreme Court at Special Term*, (MACOMBER, J.) overruled the demurrer. After recapitulating the contents of the

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complaint, concluding with the fact that the sale of the bonds 14
was unnecessary and contrary to the will, the learned judge said :

From all these facts so specifically alleged, together with the exhibits which are attached to and made part of the complaint, it is apparent, as has already been stated, that the action is simply in trover to recover damages for the conversion of personal property. All other allegations are matters of evidence, except those which are irrelevant. The analysis of the complaint, though disclosing much that could properly be omitted in a common law action, shows that all the essential parts of a declaration in trover have been complied with by the plaintiffs. 15
There is a distinct allegation that by the French law "the title to all the personal property of which the testator was possessed at the time of his decease vested immediately thereafter in the plaintiffs" and in those to whose rights the plaintiffs have succeeded. This is not an allegation of law ; it is an allegation of fact. It is an issue of fact tendered by the plaintiffs to the defendants, and the truth of it is admitted by the defendants in their demurrer. A general averment of ownership in the complaint is sufficient. (*Heine v. Anderson*, 2 Duer, 318.) 16

The further objection is made by the defendants' counsel that no demand has been made upon the defendants for the possession of the bonds. No demand, in my judgment, need be alleged, where there is an allegation of an actual conversion of personal property. A demand and a refusal may be proper evidence of a conversion in a case where the original possession of the defendants was lawful ; here the original taking constituted a conversion, and no demand is necessary. The allegation "converted to their own use" would, as it seems to me, be proper and suitable alike 17
in the case of an original wrongful taking, and in a case of wrongful withholding of personal property. (*Pease v. Smith*, 61 N. Y., 477 ; *Cormier v. Batty*, 9 J. & S., 70 ; *Farmers' and Traders' Bank v. Farmers' and Mechanics' Bank*, 60 N. Y., 40.)

The Supreme Court at General Term affirmed the judgment.

DAVIS, P. J. The questions presented by the demurrer depend wholly upon the sufficiency of certain allegations in the complaint.

After setting forth the will and codicil of Robert Berney,

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18 which appears to have been made and published in England, while he was domiciled and residing in Paris, the complaint avers that the said Robert Berney departed this life on the 19th of November, 1874, at Paris, and, in substance, that at the time of his death the domicile of the testator was at Paris, France, and that he left him surviving the plaintiff, Louise Berney, who is the widow of said Berney, and the several other plaintiffs, who are his sole surviving nephews and nieces, and who are all of the age of twenty-five years and upwards. The complaint then avers that "under and by virtue of the laws of France,
19 where the testator had his domicile, the title to all the personal property of which said testator was possessed at the time of his decease vested immediately thereafter in the plaintiffs other than the widow * * * the residuary legatees named in said will, their title being subject, however, to the payment of the particular legacies by said will bequeathed, and of the annuities therein given."

The first question presented is whether this averment is a sufficient allegation of ownership to entitle the plaintiffs to
20 maintain an action to recover for the conversion of a portion of the personal property of which the testator was possessed at the time of his death. The Special Term held that it was sufficient upon demurrer, and we are of opinion that that conclusion is correct.

It is necessary in an action to recover for conversion that the plaintiff should show by his complaint title to the property alleged to be converted, or his right to the possession thereof. Either of these is sufficient to entitle him to maintain the action. In this case the averment is of title under and by virtue of the
21 laws of France. This, it is alleged, is an allegation of a legal proposition or conclusion, and not of a fact. We are of opinion, however, that it is an allegation of fact, under which, at the trial of the issue, the plaintiffs would be at liberty to prove the laws of France, for the purpose of establishing the fact that the title to the personal property vested immediately upon the decease of the testator in them; and, on that fact being so proved, the legal result would be that such title would draw to it the right of possession and show full authority to maintain the

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action. The title would presumptively draw to it the right of 22 possession, and show the right to maintain an action against an alleged wrongdoer.

The complaint proceeds, then, to allege facts showing that one James Berney had fraudulently obtained possession of the property in question by virtue of letters testamentary procured in the court of another state having no jurisdiction, and that, having such fraudulent possession, through his attorneys has sold and transferred certain bonds the property to the defendants. Having thus carried the property into the possession of the defendants, the complaint alleges that, by the will and codicil 23 and the several powers of attorney, copies of which are annexed to the complaint, the said defendants had legal notice of the limitations on the power of sale and of the illegal and invalid character of the title of said bonds assigned to them; and they further allege that the defendants have converted the said bonds to their own use. What force is to be given to the allegations of notice, in the form in which it is averred, it is not necessary to determine. That averment probably presents a question of law, inasmuch as it is substantially an allegation that the will 24 and codicil and the several powers of attorney contained in themselves "legal notice of the illegality and invalidity of the title of the defendants' assignor to the said bonds assigned." The Special Term considered that the sufficiency of the allegation of conversion depended wholly upon the averment that "the defendants have converted the said bonds to their own use."

Assuming it to be a correct proposition that the allegations of the complaint are not sufficient to show that the bonds came into the possession of the defendants with any notice or knowledge of the want of title in their assignor, so that upon such allegations 25 alone an action for the conversion could not be maintained without proof of a demand before bringing the action, nevertheless, if such allegations were followed with the sufficient averment of conversion to entitle the plaintiff to put in evidence facts showing an actual conversion, that would be sufficient upon demurrer to uphold the complaint. The allegation of conversion to their own use is one of fact. It will admit, upon a trial, of evidence that the defendants not only received the bonds under the

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26 assignment in the manner stated in the complaint, but that they subsequently disposed of them under such circumstances as will uphold the action against them, assuming the plaintiffs to have been the real owners of the bonds; or to admit proof of any other fact necessary to constitute a conversion. So that the plaintiffs would be entitled, under that allegation, if the bonds still remain in the hands of the defendants, to prove a demand and refusal in order to charge them with a conversion if that proof becomes necessary. Where conversion is alleged as a fact, 27 in general terms, that is sufficient to admit of any evidence on the trial of issue joined that tends to establish such conversion; and the plaintiff is not bound to allege the particular act or acts which constitute conversion in an action of this character. We are of opinion, therefore, that the learned judge at Special Term correctly disposed of the question which arises upon this branch of the demurrer. The question upon which we have the most doubt is as to whether the averment of the laws of France, under which the plaintiffs claim their title, should not have been more precise and formal; but we are inclined to think that the 28 Special Term did not err in holding that, under that averment in the present form, the laws of France could be so proved as to support the allegation of title upon an issue of fact.

Pleadings are not now to be strictly construed against the pleader, and averments which sufficiently point out the nature of the pleader's claim are sufficient if, under them, upon a trial of the issues, he would be entitled to give all the necessary evidence to establish the claim. We think, therefore, the judgment upon the demurrer should be affirmed, with leave, however, to answer over in the usual time, and on the usual terms as to costs.

29 DANIELS and HAIGHT, J J., concurred.

Judgment affirmed, with leave to answer in twenty days after service of order on the usual terms.

The defendants moved for a re-argument before the General Term.

The General Term held to their former decision and denied the motion.

DAVIS, P. J. [*after recapitulating the grounds of demurrer*]: The substantial question presented on this motion is whether on

these assignments of grounds of demurrer it can be urged that 30
the demurrants are entitled to judgment on the ground that it
appears by the allegations of the complaint that there is a mis-
joinder of parties plaintiff. This question was not presented on
the former argument by counsel, nor was it considered by the
court. The allegations of the complaint do show that the title of
the cause of action, and the right to maintain the same, are vested
in the several plaintiffs other than the plaintiff Louise Berney,
who otherwise appears by the complaint to have an interest in
the estate of her deceased husband as a beneficiary in trust, if
the other plaintiffs recover. The long and short of it is that she 31
is improperly joined as a plaintiff.

Section 488 of the Code of Civil Procedure specifies when a
defendant may demur to a complaint and on what grounds. The
fifth ground so specified is "that there is a misjoinder of parties
plaintiff." Section 490 declares that the demurrer must distinctly
specify the objections to the complaint; otherwise, it may be
disregarded. And it further provides that an objection taken
under the fifth, sixth and seventh subdivisions "must point out
specifically the particular defect relied upon." 32

In order, therefore, to take advantage by demurrer of the
misjoinder of Mrs. Berney as a plaintiff in this action, it was
necessary that the defendants should not only assign as a ground
of demurrer "that there is a misjoinder of the parties plaintiff,"
but have proceeded to point out that the plaintiff Louise Berney
is improperly joined with the other plaintiffs, because she is
shown to have no cause of action jointly with them; but that
the sole cause of action set forth in the complaint is averred to
be in the other plaintiffs exclusive of her. A demurrer with
such an assignment and specification would probably have been 33
sustained both at the Special Term and on appeal.

It is insisted, however, that the point can be taken under the
general assignment made under the eighth subdivision of the
section, to wit, "that the complaint does not state facts sufficient
to constitute a cause of action," because the complaint shows
affirmatively that the cause and right of action are not vested in
all the parties plaintiff. There would be greater force in this
contention if it were not for the fact that the present Code

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34 makes the misjoinder of plaintiffs a special ground of demurrer, and requires that when that objection is taken the demurrant must proceed to "point out specifically the particular defect relied upon." If that had been done in this case the plaintiffs could have amended the complaint by dropping out the name of Mrs. Berney altogether; or by transferring her name, if for any reason it was desirable to continue her as a party, to the rank of defendant. They are deprived of that opportunity if it be held at this stage of the case that the same point may be made under the eighth subdivision of section 488.

35 Besides, it may be answered that the eighth subdivision of the section does not reach any such defect. It is aimed only at a failure to state any cause of action in the complaint. Where several plaintiffs unite in bringing an action and state in their complaint facts which do constitute a cause of action in favor of one or more, but not of all the plaintiffs, a demurrer based upon an assignment of the eighth ground of the section must be overruled, because the defect is not that the complaint does not state facts sufficient to constitute a cause of action, but that it fails to
36 show that the cause of action thus stated belongs to all the plaintiffs—which is quite another thing and belongs to another subdivision of the section.

Assuming, as we do, that the court did not err in holding that facts sufficient to constitute a cause of action are stated in the complaint, it necessarily follows that a reargument would be quite unavailing to the demurrants and should therefore be denied, with the usual costs of a motion.

BRADY and DANIELS, JJ., concurred.

Motion denied with ten dollars costs.

Whitner v. Perhacs, 25 Abb. N. C., 130.

WHITNER v. PERHACS.

New York Supreme Court, First District, Special Term, 1890.

[Reported in 25 Abb. N. C., 130.]

1. A complaint for damages for false representations, inducing plaintiff to purchase stock in a corporation and to render services to it, states but a single cause of action having two items of damage.
2. In such case the plaintiff will not be required, on motion, to make more definite and certain the allegations as to the items of damage sustained. The remedy is by motion for a bill of particulars.*

Motion by defendant for and order that plaintiff be required 1
to serve an amended complaint wherein she shall set forth and
number her alleged cause of action for deceit in the sale of
shares of stock, and shall set forth separately in another count,
and number the same, her statement of the facts constituting her
alleged cause of action for breach of contract to employ plaintiff
and for work, labor and services performed by plaintiff; also
that the complaint be made more definite and certain by stating
the particular nature and grounds of special damages alleged to
have been sustained by reason of defendant's misrepresentation.

The action was brought by Mary A. E. Whitner against Emil 2
M. Perhacs. The complaint alleged that plaintiff purchased of
defendant certain shares of the stock of a corporation of which
defendant was president. That plaintiff was personally unac-
quainted with the financial condition of such company, and

* Judges have differed in their views as to what lack of information is to be supplied by
particulars and what by motion to make more definite and certain. The principle which affords
a test is this: If the pleading alleges intelligibly all that is necessary to a good cause of action
or a good defence, and satisfies the rules of good pleading; but, by reason of the generality of a
proper allegation the adverse party cannot safely prepare for trial without unnecessary labor or
expense unless informed of the particulars by proof of which the pleader intends to support his 3
general allegation, the court may properly require the pleader to inform his adversary what
those particulars are, and may, on the trial, exclude evidence of particulars not so specified.
If, on the other hand, the pleading does not allege intelligibly all that is necessary, but is
ambiguous, equivocal or depends for its sufficiency on implication or inferences, then the
court may order the pleader to make his allegations more definite and certain. The one remedy
amplifies, by convenient specification, what is already well alleged in a general charge. The
other substitutes for matter capable of misconstruction an amended statement which is not
capable of misconstruction.

In any case where the practitioner is in doubt which is his proper remedy, he may proceed
in the alternative, and move for an order that the adversary furnish a bill of particulars, or
that he make his pleading more definite and certain.

For the forms, see 2 Abb. New. Pr. & F., 469-483.

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- 4 defendant stated to her that it was doing a very large and profitable business, that the stock was fully paid for, that the indebtedness was only \$3,500, that the machinery was owned by it, that its accounts and bills receivable aggregated \$13,000, and that plaintiff could draw \$30 a week for services she proposed to render in case she should purchase the stock. That such representations were untrue and were made with intent to defraud plaintiff and induce her to purchase the stock. The complaint alleged in detail the falsity of the various representations and
5 stated that plaintiff gave all her time to the business for over a year, and was enabled to draw only \$350 in all; that plaintiff has been damaged in the sum of \$9,000, etc.

- INGRAHAM, J. There is but one cause of action set up in the complaint, that is an action for damages caused by the fraudulent misrepresentations made by defendant. The fact that there are two items of damage, one the amount paid by plaintiff for the stock, and one the value of the services rendered to the corporation, does not make two causes of action. The motion to separately state the causes of action denied. Nor should the plaintiff
6 be required to make the complaint more definite and certain, as to the items of the damage alleged to have been sustained by plaintiff. If information is sought upon that ground, the proper remedy is by a bill of particulars, and not a motion to make the complaint more definite and certain. Motion should therefore be denied, with \$10 costs.

For a good statement by way of counterclaim of a cause of action for deceit, see *Rothschild v. Whitman*, *post*, p. 244.

Sheldon v. Lake, 9 Abb. Pr. N. S., 306.

SHELDON v. LAKE.

New York Common Pleas, Special Term, 1871.

[Reported in 9 Abb. Pr. N. S., 306.]

1. A complaint alleging that defendant assaulted the plaintiff, dragged him violently through the public streets, imprisoned him in the custody of the sheriff, and restrained him of his liberty without probable or reasonable cause, whereby he was wounded, injured in credit, and hindered in business, states but one cause of action.*
2. Such allegation of the several parts of one continuous transaction are not irrelevant nor redundant.
3. But an allegation that such acts were in violation of law, not being a traversable allegation, is irrelevant and redundant, and should be struck out on motion.†

Motion to compel plaintiff to amend his complaint, or to strike 1
out parts.

The allegations of the complaint were as follows:

That on March 23, 1870, at the city of New York, the defendant with force and arms assaulted the plaintiff *and with great force and violence, pulled and dragged about the said plaintiff, and also, then and there forced and compelled the said plaintiff to go from a certain place in said city into the public streets thereof, and then and there, forced and compelled him to go in and along divers public streets in said city, and then and there imprisoned the said plaintiff, and put him in the custody of the sheriff of the county of New York, and detained him for the period of several days in said custody, and restrained and deprived the said plaintiff of his liberty* without any reasonable or probable cause whatsoever. 2

And said plaintiff further says, that all of the said malicious acts aforesaid were *contrary to the laws and customs of this* 3

* A complaint alleging that defendant led plaintiff into making a hard and unconscionable lease, and then, after plaintiff had sown crops, etc., turned him off, and procured his arrest on a malicious charge of embezzlement, and took possession of his household goods, etc., and that all these acts were in pursuance of defendant's plan to defraud plaintiff, states but one cause of action. In such a case it is not necessary to allege termination of the prosecution complained of as malicious. In this respect the action is for abuse of process. *Bebinger v. Sweet*, 1 Abb. N. C., 263.

† It is doubtful whether now a motion merely to strike out a conclusion of law would be sustained, it is so well settled that it is not admitted by failing to deny it.

Sheldon v. Lake, 9 Abb. Pr. N. S., 306.

- 4 *state, and in violation of the same*, and against the will of the said plaintiff, whereby the said plaintiff was not only greatly hurt, bruised, and wounded, but was also thereby then and there greatly exposed and injured in his credit and circumstances, and was then and there hindered and prevented from performing and transacting his affairs and business, by means whereby, said plaintiff says he has sustained damages to the amount of ten thousand dollars.

WHEREFORE, etc.

- 5 The defendant moved to strike out parts of the complaint, especially those indicated above by italics, as irrelevant and redundant; or, if more than one cause of action was intended to be set up, that the complaint be made more definite and certain, and the causes of action be separately stated, and distinctly numbered.

It was conceded by the plaintiff's attorney, on the motion, that the action was for false imprisonment, and that alone.

- 6 ROBINSON, J. The motion to strike out parts of the complaint as irrelevant and redundant is denied, except the sentence hereafter quoted.

The several statements of the plaintiffs as to the acts complained of, have relation to but one continuous transaction, alleged with special circumstances of injury or aggravation as to each step in the progress of the affair, and they constitute a single cause of action for injury to the person, with or without force, in the several occurrences related in the pleading.

- 7 They do not constitute separate causes of action. The plaintiff could not sue and recover for the assault first alleged, as for the act of dragging him through the streets, or for the false imprisonment lastly alleged, and again maintain another action for any of the other matters attending his arrest and imprisonment. (*Farrington v. Payne*, 15 Johns., 432; *Fetter v. Beale*, 1 Salk., 11.)

The Code of Procedure permits the joinder of separate causes of action for injuries, with or without force, to the person (§ 167, subd. 3); and the court could consolidate such actions as might have been originally joined; but such power is in no way decisive as to the entirety of causes of action, if separately and indepen-

dently stated, and occurring on different occasions, or as to what 8
might constitute different causes of action. To allow the uniting
in one statement, of a cause of action, consisting of different
trespasses (where they all substantially arose out of the same act),
such as the statement of an assault, an assault and battery and
false imprisonment, does not prejudice the defendant, since he
may in his answer confess, deny or justify each separate act;
while to regard them as separate causes of action and subjects of
different suits, would be allowing an unwarrantable splitting up
of controversies.

The several subjects of complaint having reference to an 9
entire, although continuous transaction, their joinder as one is
properly allowed without charge of irrelevancy or redundancy.

The case disclosed by the complaint is one of injury to the
person, and *prima facie* actionable.

The allegation that such acts are "contrary to the laws of the
state, and in violation of the same (*contra pacem regis*)," was,
under the old system of pleading, regarded as mere matter of
form, and not traversable (1 Chitty Pl., 422; *Gardner v. Thomas*,
14 Johns., 134). It is equally so under the Code, as a mere mat- 10
ter of form, or conclusion of law, and is not necessary or proper
to be stated. The rights of the parties are to be judged solely
by the facts stated; and the allegations last above quoted ought
to be stricken out as irrelevant and redundant.

No costs are allowed.

Order accordingly.

Rothschild v. Whitman, 182 N. Y., 472.

ROTHSCHILD v. WHITMAN.

New York Court of Appeals, 1892.

[Reported in 182 N. Y., 472.]

1. In an action for malicious prosecution or false imprisonment, the claim upon which such previous prosecution was founded is not a proper counterclaim.
2. The complaint was for a malicious action and arrest on an order therein, which order it was alleged was vacated as illegal and without jurisdiction. The answer set up as a counterclaim that plaintiff, as manager of a firm, by deceit induced defendants to sell the firm goods on credit, and secretly shipped them away and disposed of them, to defendant's damage, some months before the suit for malicious prosecution; and that this constituted part of the grounds for the order of arrest, which was vacated not because the allegations on which it was granted were untrue, but because of a misjoinder of causes of action. *Held*, that the claim for damages for deceit (though the inducement to the action and arrest), arose out of neither, but existed independently of both; that it was not the cause, but rather the reason or pretext of the action and arrest; so that the claim and counterclaim did not arise out of the same transaction.

1 An action for malicious prosecution.

The complaint was as follows:

I. That, on or about September 1st, 1887, the plaintiff was engaged in business in the city of New York, county and State of New York, as manager of the dry goods business of Maier Rothschild, and was, on or about said date, conducting the said business as manager.

- 2 II. That, on or about said date, the defendants not having any just or probable cause of action against the plaintiff, did then and there wrongfully and maliciously begin an action against the plaintiff, and did cause to be issued out of the Supreme Court of the State of New York, in and for said county, a certain alleged order of arrest in an action in which the defendants were plaintiffs, and placed the same in the hands of the sheriff of the city and county of New York for service, and did thereupon cause the plaintiff to be taken into custody by the said sheriff thereunder, and held to bail in the sum of ten thousand dollars, and that plaintiff was kept in custody under said pretended order of

arrest by the said sheriff for about a week, and was compelled to, 3
and did, disburse large sums of money, aggregating one thousand
dollars, in and about said arrest, and to counsel; and that plaintiff,
by reason of said arrest, was compelled to give up said business,
and was greatly injured in his good name and credit among mer-
chants in the city of New York, and elsewhere, and among his
friends and acquaintances, and suffered greatly in body and mind
by reason of the disgrace attendant thereon.

III. That thereafter, and upon the motion of this plaintiff, the
said alleged order of arrest was duly vacated by said Supreme 4
Court, and upon the ground that the same was illegal, unauthor-
ized, and that the court had not jurisdiction to grant the same,
and an order was duly entered thereon, on or about the 29th
day of December, 1887, and defendant discharged thereunder,
and that said proceeding has been wholly and finally terminated
in favor of the plaintiff and against the said defendants by final
order of said court.

IV. That by reason of the premises plaintiff suffered damages
in the sum of fifty thousand dollars.

WHEREFORE, plaintiff demands judgment against the defend- 5
ants for his damages aforesaid, in the sum of fifty thousand
dollars, with interest thereon from said date, besides the costs of
the action.

The answer contained denials, and, for a further defence and
by way of counterclaim, alleged:

VI. That the defendants, at the times hereinafter mentioned,
were copartners, doing business under the firm name of Whit-
man, Creighton & Co. 6

VII. That the plaintiff, Abraham Rothschild, was connected
in business with the copartnership of C. M. Rothschild & Co.
prior to the 28th day of September, 1887, and during the year
1886, the said C. M. Rothschild & Co. being a partnership under
the name of Charles M. Rothschild and Jacob M. Rothschild,
doing business at No. 40 White street, in the city of New York,
and that the said Abraham Rothschild was actual manager of the
business of said firm.

Rothschild v. Whitman, 182 N. Y., 472.

7 VIII. That in the months of January and February, 1887, the plaintiff induced these defendants to sell and deliver to the said firm of C. M. Rothschild & Co. goods and merchandise of the value of \$2,790.23.

8 IX. That the said Abraham Rothschild, the plaintiff in this action, induced these defendants to make said sale, well knowing and intending that the said firm of C. M. Rothschild & Co. would not and could not pay these defendants for said goods, and the said Abraham Rothschild induced and effected said sale by fraud and deceit as follows, to wit: The said firm of C. M. Rothschild & Co. and the said Abraham Rothschild made various false and fraudulent statements of the financial standing of the said firm of C. M. Rothschild & Co. to various mercantile agencies in New York City, well knowing and intending that the said agencies should communicate the same to their customers, and that a large and fictitious and unwarranted credit would thereby be obtained for the said firm of C. M. Rothschild & Co.

9 X. That the goods purchased from these defendants were purchased on a credit of sixty days.

XI. That by means of such false and fictitious credit the said Abraham Rothschild purchased and caused to be delivered to the firm of C. M. Rothschild & Co. merchandise aggregating in value at least the sum of \$200,000, part of which merchandise was the goods sold by these defendants to the said C. M. Rothschild & Co.

10 XII. That, after receiving such merchandise, and before the same had been paid for or the term of credit thereon had expired, the said C. M. Rothschild & Co. and Abraham Rothschild, with intent to cheat and defraud their creditors, and in execution of their intention not to pay for the goods purchased from these defendants, secretly shipped away, concealed, sold and otherwise disposed of nearly all the entire stock of merchandise so obtained upon credit aforesaid.

XIII. That on or about the 23d day of March, 1887, the balance of stock not removed from the said store, amounting to about \$10,000, was taken upon attachment issued in a suit brought by John Claffin and others.

XIV. That thereafter this plaintiff, on or about April 10th, 11 1887, reopened a store which had theretofore been occupied by C. M. Rothschild & Co., and commenced and conducted a business of the same character as had been conducted by him for C. M. Rothschild & Co., under the name of Maier Rothschild, and in that business received the proceeds of the merchandise which had been secretly shipped away and disposed of from the store of the said Charles M. and Jacob M. Rothschild, and received large quantities of the merchandise which had been secreted by the plaintiff and the said C. M. Rothschild & Co., as 12 aforesaid; and these defendants allege that the said Abraham Rothschild aided and abetted the said C. M. Rothschild & Co. in their purchase and receipt of the said goods from these defendants, and in their false and fraudulent representations with regard to their credit, and in the concealing and carrying away of the said goods, well knowing that the said representations were false and untrue, and that the purchase and receipt of said goods was fraudulent, and that the same were not to be paid for, and that the same have not been paid for, although 13 demanded.

XV. That these defendants had no knowledge of the falsity of said representations, and sold the said goods and merchandise and delivered the same to this plaintiff for C. M. Rothschild & Co., being deceived and thereby induced by their said representations and the said actions of the said Abraham Rothschild.

XVI. That the said C. M. Rothschild and Jacob M. Rothschild are wholly and totally insolvent.

XVII. That the defendants have been damaged by the matters herein alleged in the sum of \$2,790.23, with interest 14 from February 26th, 1887.

XVIII. That the matters hereinbefore alleged constitute part of the grounds and one of the causes of action for which the arrest of the plaintiff, complained of in this action, was made, and that the vacating of said arrest was not on the ground that said allegations were untrue, but because of a misjoinder of causes of action and parties.

WHEREFORE, these defendants demand judgment that the

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- 15 complaint may be dismissed and that the defendants may have judgment against the plaintiff for their said damages of said counterclaim and their costs.

The plaintiff demurred to the alleged counterclaim contained in the answer on the ground that "it does not constitute a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, nor is it connected with the subject of the action."

- 16 *The Supreme Court at Special Term* (O'BRIEN, J.) overruled the demurrer.

The Court at General Term reversed the ruling and sustained the demurrer, holding that, as the complaint alleged a cause of action both for false imprisonment and also for malicious prosecution, the defendant had a right to proceed on the one most favorable to himself, *i. e.*, that this action is one for malicious prosecution; but that even in that view of the complaint, the counterclaim is not connected with the subject of the action, but is wholly separate and distinct.

- 17 *The Court of Appeals* affirmed the judgment.

- VANN, J. A counterclaim must tend in some way to defeat or diminish the plaintiff's recovery, and must be either (1) a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action, or (2) in an action on contract, any other cause of action on contract existing at the commencement of the action. (Code Civ. Pro., § 501.) The counterclaim in question is a cause of action tending to diminish the plaintiff's recovery, and to that extent, conforms to the requirements of the statute. As this is not an action on contract, before we can determine that the counterclaim should stand as a pleading, we must ascertain whether it arose out of the transaction set forth in the complaint, and if it did not, whether it is connected with the subject of the action within the meaning of the Code. What is the transaction set forth in the complaint as the foundation of the plaintiff's claim? It is the commencement of an action against him, with malice and without probable cause,
- 18

and his arrest therein under process that was afterwards set aside 19
as illegal. What is the counterclaim? A cause of action for
damages caused by deceit in the purchase of goods on credit.
The deceit was practiced and the goods obtained in January,
1887, while the action was commenced and the arrest made in
the following September.

While the deceit was the inducement to the action and arrest,
it arose out of neither, because it preceded both and existed
independently of both. Although it was the alleged ground of
the action and arrest, it was not the cause of either, but was 20
rather the pretext or ostensible reason. A groundless and mali-
cious prosecution is caused by the act of commencing the action,
not by the reasons given for commencing it. An illegal arrest,
such as that in question, is caused by the issuing and service of
the order of arrest, not by the facts recited therein. There is no
relation of cause and effect between an illegal act, or the deter-
mination to do one, and the excuse alleged for doing it. We
think that the claim and counterclaim did not arise out of the
same transaction, and that the plaintiff's claim rests upon an
entirely different foundation from the defendants' counterclaim. 21
Each was a separate and distinct wrong and a transaction by
itself.

The question remains whether the counterclaim was connected
with the subject of the action, or, in other words, with the facts
constituting the plaintiff's cause of action. (*Chamboret v. Cagney*,
2 Sweeney, 378; *Lehmair v. Griswold*, 8 J. & S., 100.)

The complaint and answer set forth independent torts, differ-
ing radically in nature and committed upon occasions widely
separated. Whether the subject of the action is malicious pros- 22
ecution, or false imprisonment, it is distinct and independent of
the claim of the defendants. There is no necessary or legal con-
nection between the two. It is not like an action for converting
wood and a counterclaim for waste in cutting the same wood
(*Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y., 552), or where
certain goods are the subject of the action and a claim is made
for the value of the same goods (*Thompson v. Kessel*, 30 N. Y.,
383), or where a mutual claim is made to a trademark (*Glen &
Hall Mfg. Co. v. Hall*, 61 N. Y., 226).

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- 23 On the contrary, the effort is here made to set up one tort committed in January against another committed in September, the one being for an injury to property and the other for an injury to the person. The circumstance that the deceit which constituted the former was the pretext or excuse for perpetrating the latter, establishes no such connection as to satisfy the statute, any more than if A slanders B on the Fourth of July and B thrashes him for it at Christmas. (Schnaderbeck v. Worth, 8 Abb. Pr., 37; Fellerman v. Dolan, 7 *id.*, 395; Askins v. Hearn, 24 3 *id.*, 184, 187.)

The judgment should be affirmed, with costs, with leave to the defendants to amend their answer within twenty days, upon the payment of costs.

All the judges concurred.

Judgment affirmed.

Fleischmann v. Bennett, 87 N. Y., 231.

FLEISCHMANN v. BENNETT.

New York Court of Appeals, 1881.

[Reported in 87 N. Y., 231, aff'g 23 Hun, 200.]

1. An innuendo does not enlarge the matter set forth specially in other parts of the complaint. It only explains the application of the words employed. When not justified by the antecedent facts to which it refers, so that rejecting it, the words are not actionable, a demurrer lies.
2. Though it is not necessary under Code Civ. Pro., § 535, to state extrinsic facts showing the application of defamatory matter to the plaintiff, a general averment that it was published of and concerning him is not sufficient if other allegations setting forth the cause of action show it was not of or concerning him.
3. While the section 535 of the new Code dispenses with the necessity of averring, in detail, the facts which evince who was the person intended, it does not authorize the plaintiff to prosecute his action after he has made a complete denial of his connection with, and of the application of the facts stated in the alleged libelous matter to himself on which it is founded.
4. In an action for libel by publishing the statements concerning a specified establishment carried on by persons having the same name as plaintiff, allegations in the complaint that plaintiff had no connection with such persons, but was engaged in a different business, held to show that he had no cause of action, and that the complaint was not aided by an averment that the publication was of and concerning the plaintiff, nor by the usual innuendo "meaning the plaintiff" inserted in connection with the libellous words which did not appear to refer to him.
5. Where, in an action for libel, one count in the complaint is upon several distinct articles, published at different times, which are separately numbered, and treated by the plaintiff as separate causes, plaintiff cannot aid a deficiency in one by claiming that the others are set out as matter of inducement only.

Action for libel.

1

The complaint alleged:

"I. That the plaintiff, prior to and at the time of the commission of the grievances hereinafter mentioned, was engaged in business in the city of New York, at the corner of Broadway and Tenth street, as proprietor of the 'Vienna Model Bakery,' and conducted the business of a bakery and restaurant upon said premises.

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2 "II. That, until then, this plaintiff had always maintained a good reputation and credit, and had never been guilty of any violations of the laws of this state, nor been in any manner a copartner, owner or agent in any business or calling such as described in the libel hereinafter set forth, or in the production of milk, or distillery swill, so called, or distillery waste or grain, or ownership or care of cows, or keeping of cows, or feeding of cows, or guilty of any of the offences charged against him in the libel hereinafter set forth; nor, until the publication thereof, was he ever suspected to be.

3 "III. That the business of this plaintiff as bakery and restaurant keeper has always depended largely on the good reputation and credit of this plaintiff, and on the personal trust reposed in him and in the said articles manufactured and sold by him; and that this plaintiff, up to the publication of the said libel hereinafter set forth, possessed a valuable and lucrative business and custom.

4 "IV. That, at the time hereinafter mentioned, the defendant was the editor, publisher and proprietor of the *New York Herald*, a newspaper published daily at the city of New York.

"V. That, on the 13th day of May, 1877, the defendant, well knowing the premises, maliciously composed and published concerning the plaintiff and concerning the premises, in said newspaper, the false and defamatory matter following, to wit: [*The following extract shows sufficiently the points upon which the decision turned.*]

5 "Another Huge Swill Milk Factory Exposed (meaning the distillery of Gaff, Fleischmann & Co., and that this plaintiff was one of the owners and proprietors of the cows referred to in said article). The Horrors of Blissville; 800 Diseased Cows Fed on Distillery Slops. 12,800 Quarts of Lacteal Poison Daily; Shall This Go On? (meaning by this plaintiff, and that he was one of the proprietors of the said cows, and conducted the said business of delivering or selling milk, which was, or had been, poisoned by this plaintiff, and said firm of Gaff, Fleischmann & Co., and meaning that he was a member of said firm.)"

[*In the same manner the residue of the article was set forth, with similar innuendoes applying it to the plaintiff.*]

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“VII. And the plaintiff further shows, that on the 14th day of May, 1877, the defendant, well knowing the premises, did maliciously compose and maliciously publish, concerning the plaintiff, in said newspaper, a certain further article, containing the false and defamatory matter following, to wit: [*In the same manner as above. another separate article was set forth which in terms related to the ‘Blissville swill milk sheds,’ and innuendoes were here also inserted applying the defamatory statements to the plaintiff.*]

Other alleged libelous articles were also set out, which it is not necessary here to state.

Defendant demurred to the portions of the complaint containing the first and second articles, which were claimed to be separate and distinct causes of action, on the ground that it appeared by those portions of the complaint that the articles were not published of and concerning the plaintiff, and so that they stated no cause of action.

The Supreme Court at Special Term overruled the demurrer, and an interlocutory judgment was entered for plaintiff.

The General Term reversed the judgment, holding that the articles complained of had no reference either to the plaintiff or his business. That to constitute an actionable libel, an important element is its application to the plaintiff, which is not contained in the complaint objected to by this demurrer.

The Court of Appeals affirmed the judgment.

MILLER, J. The complaint in this action sets forth, as causes of action separately, six distinct articles, published at six different times. A demurrer is interposed to the first two causes of action, the articles set forth in which do not name the plaintiff. The alleged ground of demurrer, so far as these two causes of action are concerned, is that each one is self-contradictory, inasmuch as it alleges that the article stated was published of and concerning the plaintiff, while it elsewhere contradicts this averment by allegations which are entirely at variance and inconsistent with it.

The counsel for the defendant insists that the complaint shows

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- 10 affirmatively that the article set out as the first cause of action was not published of, or concerning the plaintiff, and as it answers itself, the demurrer was well taken. In determining the question presented, it is important to examine the complaint for the purpose of ascertaining the nature of the allegation stated and the basis upon which it is constructed. At the outset it alleges that the plaintiff was in business at a certain place, which is named, and had conducted the business stated upon said premises. After the usual allegation that he had maintained a good reputation and credit, it proceeds to state that he had never
- 11 been guilty of any violation of the laws of this state; nor in any manner a copartner, owner or agent in any business or calling such as is described in the libel hereinafter set forth, or in the production of milk, or distillery swill, so called, or distillery waste or grain, or the ownership or care of cows, or the keeping of cows, or the feeding of cows, or of any of the offences charged in the libel set forth.

- Immediately afterward follows the allegation of the publication of the libel, which is set forth *verbatim*, and a perusal of which
- 12 discloses that such a business as the complaint alleges that the plaintiff had not been engaged in, was conducted by the firm of Gaff, Fleischmann & Co., and that the libelous matter related to this business, and to the last-named firm, and to no other person or persons who are not members of that firm. The libel referred to was evidently directed against, and intended to embrace the persons mentioned. The complaint nowhere negatives the averment that the firm of Gaff, Fleischmann & Co. were the parties engaged in the business mentioned therein; and under such a pleading, therefore, it cannot be claimed that any other
- 13 persons besides the members of the firm were referred to, or intended to be included in the libelous charges made. As the libel neither describes nor refers to the plaintiff, nor to the business in which he was engaged, but names a different business, and a firm of which in a preceding portion of the complaint it is alleged he is not, and never was a member, it is manifest that the plaintiff cannot in any way be connected with the libelous matter set forth.

Instead of averments that the plaintiff was engaged in the

business named, and was a member of the firm so engaged, it is 14 denied on the start, and stated to the contrary, that he was engaged in another and a different kind of business. Under the allegation in the complaint as to plaintiff's business, and that he was not connected in any form with the business described in the libel, with a statement of the publication showing on its face that it did not relate to, and was not published of and concerning the plaintiff, it is not apparent in what form or upon what theory the portions of the complaint demurred to can be upheld.

The learned counsel for the plaintiff, however, claims that it is not a necessary ingredient of the libel that the person intended should be named; and it is a question for the jury to determine whether the publication referred to the plaintiff and caused him injury. While, no doubt, an action for libel may be maintained where the plaintiff is described in the libelous matter, directly or indirectly, without his name, and is pointed out so that it is capable of direct proof that he was intended; yet where the allegations negative such a conclusion and show to the contrary, this rule has no application. There is no principle which authorizes the introduction of any such evidence, where, 15 on the face of the complaint, it is clearly apparent that the libelous words do not relate to, and have no connection with the plaintiff or his business as stated therein.

The authorities cited by the learned counsel for the appellant have no application when the complaint plainly shows that the plaintiff was not intended as is the fact here. The omission of the name, or an ambiguous description of the person, or even words used in an uncertain and doubtful sense which require extrinsic evidence to explain, may be rendered sufficiently 17 certain by the proper averments with a colloquium (Folkard's Starkie on Libel, §434); but there are no such allegations in the complaint as brings the case at bar within the rule laid down. The averment that the publication was of and concerning the plaintiff does not, we think, obviate the difficulty, inasmuch as the previous allegation as to the plaintiff's business, and that he was not engaged in the business described in the libel, shows that it could not and did not relate to the plaintiff, and hence it is not applicable to the facts set forth in the pleading.

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- 18 The defects which exist as to the first alleged cause of action are not obviated or cured by the innuendo which afterwards recurs, "meaning the plaintiff," for the language of the libelous article will not bear any such interpretation when considered in connection with other averments which allege that the plaintiff was engaged in other business and had no connection with the firm of Gaff, Fleischmann & Co.

- Under the Code of Civil Procedure, §535, it is not necessary to state any extrinsic facts for the purpose of showing the application of the defamatory matter to the plaintiff; and the question
19 in regard thereto is covered by the averment that it was published of, and concerning the plaintiff, and when such averment can be held to apply, and is not as in this case contradicted and rendered nugatory by other allegations. The innuendoes here are falsified by averments that the plaintiff was engaged in other business, that he was never in the milk business, nor a partner of Gaff, Fleischmann & Co. The libelous articles assail the proprietors of the Blissville milk establishment and their agents. The plaintiff denies all connection or association with that concern, and thus
20 asserts that he is not one of the persons intended by the libel. It was aimed and directed against the firm, and not against plaintiff, who claims he had nothing to do with them, and hence he could not be injured thereby. An innuendo does not enlarge the matter set forth specially in other portions of the complaint. It only explains the application of the words employed. When not justified by the antecedent facts to which it refers, so that, rejecting it, the words are not actionable, a demurrer will lie. (*Caswell v. Raymond*, 2 Abb. Pr., 193; *Blaisdell v. Raymond*, 14 *id.*, 446-458; *Fry v. Bennett*, 5 Sandf., 65.)

- 21 While the section of the new code cited dispenses with the necessity of averring in detail the facts which evince who was the person intended, it does not authorize the plaintiff to prosecute his action after he has made a complete denial of his connection with, and of the application of the facts stated in the alleged libelous matter to himself on which it is founded. It cannot, we think, be fairly claimed that the statement that the name was familiar sufficiently points to the plaintiff so as to indicate that he was intended, or that from this or any other

allegation referred to there was any question of fact for the jury 22
as to whether the plaintiff's bread was alluded to.

In regard to the article set forth as the second cause of action,
no cause of action is made out for the same reasons which
affect the first cause of action. It is aimed at and denounces
the management described, and the Blissville Distillery, giving
details as to the offensive character of the same, and referring to
the statute and citing the same as applicable to Gaff, Fleisch-
mann & Co. It makes no charge against the plaintiff and does
not connect him with the copartnership.

It does not distinctly allege that the firm named are the 23
owners, but leaves the inference to be drawn, from the previous
reference to them, that they were the owners, and the com-
plaint, as already stated, absolutely denies that the plaintiff was
a member of any such firm, or that he was the owner of the
Blissville establishment, or had any interest whatever in any
such business.

By this denial it is manifest, as a matter of law, that neither
of the articles can be held to apply to the plaintiff. It may also
be remarked that the second article cannot be regarded as having 24
any defamatory application to any person who is not a member
of the firm. The count, in the complaint referred to, we think,
cannot be upheld upon the ground that it contains but one cause
of action, and is not susceptible of any such construction. It is
divided into several parts, alleges several distinct causes of
action, arising out of several articles published on different dates,
each of which is separately numbered and is treated as such by
the plaintiff. It cannot, therefore, be regarded as embracing only
one separate and distinct cause of action. It is not apparent in
what manner the plaintiff could unite these several and distinct 25
libels as one single cause of action; nor is there any ground for
claiming that either one of the articles is set out as a matter of
inducement to the others, or any of them. Regarding the
language employed, the intention of the pleadings to be derived
therefrom, and the various libels which constitute the gravamen
of the action, there is no reason for claiming that but one cause
of action is set forth.

The allegation of the plaintiff as to the causes of action de-

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26 murred to is that the libelous articles published related to himself, while on their face it is clear that they had no reference either to him or to the business in which he was engaged.

We think the General Term was right in its judgment, and that the same should be affirmed.

All the judges concurred.

Judgment affirmed.

CALDWELL v. RAYMOND.

N. Y. Supreme Court, Fourth District, Special Term, 1855.

[Reported in 2 Abb. Pr., 193.]

1. The complaint in an action for libel consisting in words not on their face libelous, must distinctly aver the extrinsic fact on which plaintiff relies to show the alleged libelous character of the words complained of; and it is not sufficient that this fact is alleged by way of innuendo.
2. The complaint in such case must also show that the defendant had actual knowledge of the particular extrinsic fact relied on; and it is not sufficient to allege that the words were published "falsely and maliciously."
3. The complaint must also show special damage.

Joseph W. Caldwell sued Henry J. Raymond, Fletcher 1 Harper, Jr., and Edward B. Wesley, proprietors and publishers of the New York Daily *Times* for an alleged libel. The article complained of was an ordinary advertisement of marriage, which was as follows:

"Married—Joseph W. Caldwell to Elizabeth Ehle, late of New York."

To the original complaint in the action the defendants demurred on the ground that it did not state facts sufficient to constitute a cause of action. The plaintiff then served an 2 amended complaint, which, after averring that defendants were the proprietors of the newspaper in which the advertisement appeared was as follows: * * * "That said defendants intending and maliciously contriving to injure the said plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace with and among his neighbors and other good and worthy citizens, and cause it to be suspected

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and believed by those neighbors and citizens that said plaintiff 3
had been and was guilty of the offences and misconduct herein-
after mentioned to have been committed by him, the said defend-
ants did on the 30th day of June, 1855, carelessly, negligently,
falsely and maliciously compose and publish and cause to be
published in the said newspaper, of and concerning the said
plaintiff, a false, scandalous, malicious, and defamatory libel,
containing among other things the false, scandalous, malicious
and defamatory and libelous matter following, of and con-
cerning the said plaintiff, that is to say, "Married: Joseph W. 4
Caldwell," said plaintiff meaning, "to Miss Elizabeth Ehle,
late of New York," meaning a public prostitute known by that
name. That said Elizabeth Ehle is and was a public prostitute,
and well known to be so, thereby intending to charge that said
plaintiff had been guilty of marrying a prostitute. By means of
the committing of said grievances by the said defendants, the
said plaintiff has been and still is greatly injured in his good
name, and fame, and credit, and brought into public scandal,
infamy and disgrace with and among his neighbors and other
good and worthy citizens, to the damage of said plaintiff of five 5
thousand dollars."

To this amended complaint, also, the defendants demurred,
assigning the same ground as before. The demurrer was argued
at the Plattsburgh Special Term.

JAMES, J. On the argument of this demurrer the defendants'
counsel insisted that the publication set forth in the complaint
had no injurious or defamatory meaning, and urged the follow-
ing as the grounds why the complaint was insufficient and de-
fective: 6

1. The extrinsic fact, by means of which the plaintiff seeks to
show the words libelous, viz., that Elizabeth Ehle was a public
prostitute, should be distinctly and independently averred in the
complaint, so that the defendants can traverse the allegation.
2. The complaint should have averred that the extrinsic fact
relied on was known to the defendants at the time of the publi-
cation.
3. The complaint should have averred special damage.

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- 7 I.—That the publication, on its face, bore no injurious or defamatory meaning will not be disputed, and it is a well settled rule in pleading in actions of this character, that when the words used by the defendant do not, of themselves, convey the meaning which the plaintiff would attribute to them, and such meaning results only from some extrinsic matter or fact, such extrinsic matter or fact must be alleged in the complaint and proved on the trial. It was therefore necessary for the plaintiff in this case distinctly to aver the extrinsic fact upon which he relied to make the publication libelous.
- 8 It is insisted that this has not been done, and that the extrinsic matter is only suggested by way of innuendo. If the defendants are right in this, then the complaint is defective, because it is not enough to allege by way of innuendo distinct and independent averments in aid of the charge, and to rely upon such innuendo to authorize the jury to determine the character of the charge. An innuendo does not enlarge the matter set forth in the other portions of the complaint; it is only explanatory of the matter already charged, and does not extend the sense of the words beyond their natural import, unless accompanied by a distinct averment or colloquium, or other introductory allegation to which it may properly have reference. (1 Saund., 243, n. 4.) The rule in this case has not been changed by the Code. Section 164 only dispenses with the allegation of extrinsic facts showing the application of the words to the plaintiff. When a publication can be determined as libelous only by reference to extrinsic facts, the existence of such facts must now, as formerly, be averred in the complaint. (Pike v. Van Wormer, 5 How. Pr. R., 171; 6 *Ib.*, 99; Fry v. Bennett, 5 Sand., 54.)
- 10 The only portion of the complaint in this action which suggests any extrinsic matter or fact calculated to render the publication objectionable, is that which states that the defendants published "the libelous matter following of and concerning the said plaintiff," that is to say, "Married: Joseph W. Caldwell" (said plaintiff meaning "to Miss Elizabeth Ehle, late of New York" (meaning a public prostitute known by that name); that said Elizabeth Ehle is and was a public prostitute, and well known to be so; thereby intending to charge that said plaintiff has been guilty of marrying a

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prostitute." The pleader may have intended the last sentence 11
as an averment of the extrinsic fact, but it cannot be so treated.
To give it the character of a distinct averment it would be nec-
essary to supply the words, "And the said plaintiff further
avers." In that case it would not make sense, and besides the
averment of the extrinsic fact would follow the innuendo, while
the rule of pleading is uniform that such averments must pre-
cede the innuendo. To make the passage bear any connected
sense whatever the whole must be treated as an innuendo, and
read thus: "Married: Joseph W. Caldwell (said plaintiff
meaning) to Miss Elizabeth Ehle, late of New York (meaning a 12
public prostitute known by that name, and that said Elizabeth
Ehle is and was a public prostitute, and well known to be so,
thereby intending to charge that said plaintiff had been guilty of
marrying a prostitute)." There being no distinct averment of
the extrinsic fact from which it is sought to make the publication
libelous, the complaint is defective and the demurrer well taken.

II.—The second point is "that the complaint should have
averred that the extrinsic fact relied on was known to the de-
fendants at the time of the publication." It contains no such 13
averment. I have heretofore said that this publication, of itself,
contains no injurious meaning towards the plaintiff. Marriage is
lawful and the law does not imply that parties to such contracts
are persons of bad character, and no presumption of constructive
malice, or malice in law, can arise from the bare publication of
such a marriage notice. Presumption of malice can only arise
when the publication, on its face, is capable of conveying an in-
jurious meaning, or producing an injurious effect. Every man is
presumed to foresee and intend all the mischievous consequences 14
that may justly be expected to flow from his voluntary acts.

The cases of constructive malice are exclusively such as involve
words capable of bearing in themselves a libelous meaning. The
law in such cases reasonably presumes that the defendant meant
to say exactly what he did say. But the law presumes no more
than this; and when a hidden defamatory meaning is sought to
be attributed to words in themselves innocent, and on their face
containing no such sense, by extrinsic facts outside and inde-
pendent of the publication itself, the knowledge of such facts

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15 must be shown by averment and proof to have existed in the breast of the defendant at the time of publication. This principle is substantially held in *Smith v. Ashley* (11 Metc., 367), and *Dexter v. Spear* (4 Mass., 115). A publisher may be liable for the publication of an article clearly libelous, which was inserted in his paper without his knowledge or consent; but not when he is not shown and cannot be presumed to have known that the article was intended to bear an injurious meaning. It is true that it is averred that the defendants published the words "falsely and maliciously," but that is not sufficient when the
16 extrinsic fact relied on to make the publication libelous is independent of the words published; in such cases the pleader should bring home to the defendant a knowledge of that fact.

III.—The defendants' third point is that the plaintiff should have averred special damage. This he has not done. The law in this state is now well settled that when the court can discern an injurious meaning in the plain and natural purport of the publication itself, some damage is to be presumed; but when the words are not, in their natural and obvious construction, inju-
17 rious, the plaintiff must aver and prove special damage. It was so held in *Cooper v. Stone* (2 Den., 299), and followed in *Bennett v. Williamson* (4 Sand., 60). In the former case, the Chancellor, in delivering the opinion of the court, said: "To sustain a private action for the recovery of a compensation in damages for a false and unauthorized publication, the plaintiff in such action must either aver and prove that he has sustained some special damage from the publication of the matter charged against him, or the nature of the charge itself must be such that the court
18 can legally presume he has been degraded in the estimation of his acquaintances, or of the public, or has suffered some loss, either in his property, character or business, or in his domestic or social relations, in consequence of the publication of such charge." There is nothing in the nature of the publication set forth in this complaint from which the court can legally presume that any of the consequences above set forth would flow. Special damage should have been averred.

Judgment for the defendants on demurrer, with leave to plaintiff to amend, on payment of costs.

Sprague v. Parsons, 14 Abb. N. C., 320.

SPRAGUE v. PARSONS.

New York Common Pleas, Special Term, 1884.

[Reported in 14 Abb. N. C., 320.]

1. The complaint in an action to recover damages for a trespass in levying void or irregular process need not aver malice or want of probable cause.
2. An allegation that the attachment was illegal, unauthorized and void, is not sufficient on demurrer, for it states a conclusion of law only.
3. An allegation that the attachment has been vacated for irregularity is sufficient to sustain the action, although the rule of damages may be different from that applicable in the case of a void attachment.

Demurrer to complaint.

Daniel J. Sprague sued William H. Parsons and others for damages sustained by the issuing of a void attachment and levy thereof by the sheriff, in an action in the Supreme Court, brought by these defendants as plaintiffs against this plaintiff and others as defendants, to charge them with liability for the debts of the McKillop & Sprague Company, of which it was claimed that such defendants were trustees. The complaint alleged the above matters, and that the attachment was vacated and set aside in said action, and alleged damages, etc. Defendants demurred on the ground that the complaint does not state facts sufficient to constitute a cause of action.

J. F. DALY, J. The complaint is sufficient. There is no need to aver malice or want of probable cause in suing for damages sustained by the levying of a void or irregular attachment. A process being void, the party who sets it in motion and all who aid him are trespassers. (*Kerr v. Mount*, 28 N. Y., 659; *Whele v. Butler*, 61 *id.*, 245; *Day v. Bach*, 87 *id.*, 56; see also in this court, *Wehler v. Haviland*, 42 How. Pr., 399; 4 *Daly*, 550.)

The action may be maintained if the process be irregular only, on proof that it has been set aside. The complaint avers that fact, and is sufficient in such an action. But the rule of damages may be different in such a case from the rule in case of an absolutely void attachment (*Day v. Bach*, above). The complaint here is not good as a pleading in an action of the latter class.

Langdon v. Guy, 91 N. Y., 661.

- 4 The allegation that the attachment was "illegal, unauthorized and void," is a statement not of fact, but of a conclusion of law. (*Hammond v. Earle*, 58 How. Pr., 426, 437-8.) The plaintiff will have to amend if he desires to prove on the trial that the attachment was void. But as a complaint in an action upon an attachment voidable for irregularity, the complaint is good because it avers that the attachment has been vacated.

The demurrer is therefore overruled with costs. Leave to defendant to answer on payment of costs.

LANGDON v. GUY.

New York Court of Appeals, 1883.

[Reported in 91 N. Y., 661.]

- 6 A complaint alleging that defendant wrongfully and unlawfully entered plaintiff's premises and there assaulted him, and an answer consisting of a general denial and an allegation that the premises belonged to and were in possession of a third person, and that plaintiff, on the day stated in the complaint, wrongfully entered and assaulted such owner, which assault defendant, being in the employ of the latter, rightfully resisted, do not put title to land in issue, if no injury to the freehold is alleged nor any damages to the premises claimed.

- 1 Action of trespass.

The allegations of the complaint were :

- 2 That on the 6th day of September, 1879, at the town of Kingsbury, in the county of Washington and State of New York, the said defendant wrongfully and unlawfully entered upon the premises of the plaintiff, and into his dwelling-house, and then and there wrongfully and unlawfully did beat, bruise, wound and ill-treat this plaintiff, and vindictively and without the slightest provocation or cause, did deliberately, in a brutal manner, strike this plaintiff upon his head and other parts of his person, and did seize and drag this plaintiff, and drag him out of his said dwelling-house, and did tear and injure the clothes of this plaintiff, and did attempt to handcuff and imprison this plaintiff, and did do him other bodily injuries, whereby he sustained damages to the amount of \$1,000.

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WHEREFORE plaintiff demands judgment against the defendant 3
for \$1,000, besides costs and disbursements of this action.

The answer contained the following defenses:

First.—A general denial.

Second.—“And for a second and separate defense, said defend-
ant avers that one Henry D. Langdon was the owner of and in
possession of a certain house in Kingsbury, Washington county,
New York, on the 6th day of September, 1879; that on that day
the plaintiff wrongfully and unlawfully entered said house and
assaulted said Henry D. Langdon and his wife; that this defend- 4
ant, who was then in the employ of said Henry D. Langdon, by
the order and direction of said Henry D. Langdon, as he lawfully
might do, resisted the said plaintiff in his assault upon said
Henry D. Langdon and his wife, and in the defense of Henry D.
Langdon and his wife removed said plaintiff from said house,
using no unnecessary force; which is the same act charged in the
complaint.”

The third defense is a repetition of the second defense, except
that defendant alleges himself to be a deputy-sheriff of Washing- 5
ton county, and that on said day plaintiff wrongfully entered the
dwelling-house of one Langdon and assaulted him, and that, as
such deputy sheriff, defendant removed the plaintiff from the
house without unnecessary force.

At the trial plaintiff recovered a verdict of \$25, and then
moved for an allowance of full costs on the ground that the title
to land was put in issue by the pleadings.

He relied on the following provisions of the Code Civ. Pro.:
§ 3228. *When plaintiff entitled to costs of course.* The 6
plaintiff is entitled to costs of course, upon the rendering of a
final judgment in his favor, in either of the following actions:

1. An action, triable by a jury, to recover real property, or an
interest in real property, or in which a claim of title to real
property arises upon the pleadings, or is certified to have come
in question upon the trial.

2. An action to recover a chattel. But if the value of the
chattel, or of all the chattels, recovered by the plaintiff, as fixed,
together with the damages, if any, awarded to him, is less than

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- 7 fifty dollars, the amount of his costs cannot exceed the amount of the value and the damages.

3. An action specified in subdivisions first, third, fourth, or fifth of section two thousand eight hundred and sixty-three of this act. But if, in an action to recover damages for an assault, battery, false imprisonment, libel, slander, criminal conversation, seduction, or malicious prosecution, the plaintiff recovers less than fifty dollars damages, the amount of his costs cannot exceed the damages.

- 8 4. An action, other than one of those specified in the foregoing subdivisions of this section, in which the complaint demands judgment for a sum of money only. But the plaintiff is not entitled to costs, under this subdivision, unless he recovers the sum of fifty dollars or more.

- 9 *The Special Term of the Supreme Court* granted the motion, on the ground that the complaint charged a trespass upon real property belonging to the plaintiff, as well as an assault, the answer denied the allegations and alleged ownership and possession in another, and that consequently plaintiff's *right to possession* was brought in question, was material, and might be decisive of the question as to whether the act complained of was an assault or not.

The *General Term* affirmed the order of the court below without opinion.

The *Court of Appeals* reversed the order.

- 10 DANFORTH, J. We think title to land is not brought in question by the pleadings. No injury to the freehold is alleged in the complaint, nor are damages claimed for entering upon the premises. The injury for which indemnity is sought was to the person, and the defense set up was that the acts complained of were committed in the defense of certain parties, who, being first assaulted by the plaintiff, requested the assistance of the defendant as their servant. Upon the face of the papers nothing more appears than a simple assault and battery, and justification; and as no certificate was given that the title to lands came in question upon the trial, and the recovery was less than \$50, we think

Whatling v. Nash, 41 Hun, 579.

the plaintiff was entitled to no more costs and damages. (Code, 11 § 3228, subd. 1 and 3.)

It is true the complaint alleges that the defendant wrongfully entered the plaintiff's grounds and house and there committed the assault, and the answer, besides a general denial, avers that one Henry D. Langdon, was the owner of the house, but these allegations seem mere matters of description, and not facts upon which the right of either party depends. The violence of neither was exerted to obtain or defend possession of title.

WHATLING v. NASH.

New York Supreme Court, Fifth Department, 1886.

[Reported in 41 Hun, 579.]

1. In a complaint for trespass to real property, a cause of action for entering on plaintiff's land under water and taking and carrying away fish, may be joined with one for a like entry on his land and catching and killing animals.
2. Both these are for injuries to real property.
3. The added allegations of injuries to personal property are not separate causes of action, but mere matter in aggravation of damages. [*Compare the next two cases.*]
4. A demurrer for misjoinder of causes of action does not avail to raise the objection that two joinable causes are pleaded in one commingled statement.

The defendant demurred to the complaint (1st) for misjoinder 1 of causes of action, and (2d) for insufficiency.

The Special Term overruled the demurrer. On the argument at General Term the second ground was practically abandoned.

The General Term now affirmed the judgment.

SMITH, P. J. [*after saying that the second ground was untenable*]: As to the first ground it is true that the complaint sets forth two distinct causes of action, but they are such as may 2 properly be joined in one complaint, as they are both for alleged injuries to real property. One is for a wrongful entry upon plaintiff's land under water, about April or May, 1881, and wrongfully taking and carrying away fish therefrom; the other,

Gilbert v. Pritchard, 41 Hun, 46.

- 3 for a like entry on plaintiff's land in the year 1882, and catching and killing muskrats thereon. The allegations of injuries to personal property are not, as the appellant's counsel seems to suppose, statements of separate causes of action, but are mere averments in aggravation of the wrongful entry. (*Van Leuven v. Lyke*, 1 N. Y., 515; *Howe v. Willson*, 1 Den., 181; *Dunkle v. Kocker*, 11 Barb., 387; *Clark v. Van Vrancken*, 20 *id.*, 278; *Gilbert v. Pritchard*, 41 Hun, 46.)

- 4 The question whether the two causes of action for trespass *quare clausum* should be stated in separate counts and separately numbered is not before us.

The judgment should be affirmed, with costs, with leave to the defendant to withdraw the demurrer and answer the complaint within twenty days, etc., on payment of the costs of the demurrer and of this appeal.

BARKER, HAIGHT and BRADLEY, JJ., concurred..

So ordered.

GILBERT v. PRITCHARD.

New York Supreme Court, Fifth Department, 1886..

[Reported in 41 Hun, 46.]

In a complaint alleging trespass to real property, allegations of injuries to grass and crops, and of assault and battery of plaintiff, then and there committed, are not separate causes of action, but are properly stated in aggravation of the trespass. [*Compare the preceding and the next case.*]

- 1 *The Special Term*, on defendant's motion, ordered plaintiff to separately state and number as separate causes of action, allegations of trespass to land and allegations of injury to grass, crops and person.

The General Term now reversed the order.

SMITH, P. J. The first count in the complaint alleges an assault and battery; the second alleges that defendants broke plaintiff's close, on a day stated, and then and there trod down the grass and crops and assaulted and beat the plaintiff. The

Gilbert v. Pritchard, 41 Hun, 46.

second count, as well as the first, alleges but one cause of action. 2
It is what, under the old nomenclature, was known as trespass *quare clausum fregit*, the injury to the grass and crops and to the plaintiff's person being stated, not as separate causes of action, but in aggravation of the trespass. Instances of this form of pleading were familiar under the old practice. (*Van Leuven v. Lyke*, 1 N. Y., 515; *Howe v. Willson*, 1 Denio, 181; *Dunckle v. Kocker*, 11 Barb., 387; *Clark v. Van Vrancken*, 20 *id.*, 278.) And as there is nothing in the Code prohibiting a party from alleging in one count every item of damage he may have suffered 3
from a single trespass, that form of pleading is still good.

The order appealed from should be reversed and the motion denied, with ten dollars costs and disbursements of the appeal.

BARKER and BRADLEY, J.J., concurred; HAIGHT, J., not sitting.

Order reversed, with ten dollars costs and disbursements, and motion denied.

NOTE.—A different view was taken in *Gunn v. Fellows*, N. Y. Supreme Court, Fourth Department, 1886, reported in 41 Hun, 257. It was there held (1) that in a complaint alleging trespass to real property and injuries to personal property on the premises, additional allegations of assault and battery then and there committed on plaintiff must be deemed an additional cause of action within the rule requiring separate causes of action to be separately stated and numbered. (2) The remedy against such a complaint is not demurrer, but motion to compel separate statement and numbering. (3) *It seems* that the common-law rule is that matter which itself would sustain an action cannot be pleaded merely in aggravation, and is in force under the Code. (4) The rule as to costs, where there is a recovery as to one and not as to the other cause of action, is an additional reason for maintaining this practice. 4

In nine cases somewhat similar to the two preceding cases in the text, brought by the same plaintiff against various members of the same party of trespassers, the complaint in each alleged trespass and injury to the dwelling occupied by plaintiff, and injury to furniture, and assault and battery on her person, laying damages at \$5,000. 5

The defendant in each case moved to compel plaintiff to state the assault as a separate cause of action from the trespass to real and personal property.

The Special Term denied the motion, on the ground that only one cause of action was alleged, viz., trespass.

The General Term now reversed the order.

HARDIN, P. J.: Section 488 of the Code of Civil Procedure requires "the statement of the facts constituting each cause of action" to be "separate

Gunn v. Fellows, 41 Hun, 257.

6 and numbered," when "the complaint sets forth two or more causes of action." The remedy for an omission to comply with the requirement of that section is by motion and not by demurrer. (*Bass v. Comstock*, 38 N. Y., 21; s. c. 36 How., 382; *Freer v. Denton*, 61 N. Y., 496.) If causes of action are improperly united the remedy is by demurrer, whether properly separated and numbered or not. (*Goldberg v. Utley*, 60 N. Y., 427.) The facts stated in the first branch of the complaint, under the former system of pleading, would have justified a classification of the action as one for trespass. That term, "in its most extensive signification, includes every description of wrong." (1 Chitty's Pleadings, 166.) It was an action "for injuries committed with force."

The same author says: "And the plaintiff may, in a declaration in trespass, unite a count for the battery or seduction of his servant, *per quod servitium amisit*, with a count for battery of the plaintiff himself. * * * However, if these injuries be joined with a count in trespass, then each should be stated to have been committed *vi et armis*." (1 Chitty's Pleadings, 200.)

The same learned author, at page 398, Volume 1, says: "Thus, in trespass for breaking and entering a house, the plaintiff may, in aggravation of damages, give in evidence the debauching of his daughter, or the battery of his servants under the general allegation *alia enormia*, etc., and yet the matter may be stated specially; but he cannot under the *alia enormia* give in evidence the loss of service or any other matter which would of itself bear an action, for if it would, it should be stated specially." (1 Chitty's Pleadings, 397; *Handy v. Chatfield*, 23 Wend., 35.)

8 In *Richardson v. Northrop* (66 Barb., 87), MULLIN, J., says: "The rules of pleading at common law required distinct causes of action of the same nature to be stated in separate counts; and the joinder in the same count of several distinct causes of action was consequently fatal on demurrer."

We think the requirement of § 483 of the Code of Civil Procedure that "the statement of the facts constituting each cause of action must be separate and numbered" was violated by the pleader who drew the complaint now before us. The first part of the complaint states a cause of action for breaking and entering the plaintiff's dwelling house and injuring the building and property and furniture, which allegations make out a distinct and separate cause of action, and the statement in that regard should have been separated and numbered; and the other portion of the complaint contains a "statement of the facts constituting" another cause of action for assault and battery to and upon the person of the plaintiff, and such "statement of facts" should have been numbered and separated from the first cause of action.

We, therefore, differ from the Special Term and its order which denied, the defendant's motion on the "ground that but one cause of action, namely, trespass, is alleged in the complaint." (Code of Civil Pro., §§ 481, 483; *Case v. Shepard*, 2 Johns. Cases, 29; *Benedict v. Seymour*, 6 How., 298; *Wiles v. Suydam*, 64 N. Y., 175; *Pomeroy's Remedies* and

Gunn v. Fellows, 41 Hun, 257.

Rights, §§ 452, 462; *Anderson v. Hill*, 53 Barb., 288; *Langdon v. Guy*, 91 N. Y., 660; *Fisher v. Conway*, 21 Kan., 18; *Durkee v. S. & W. R. R. Co.*; 4 How. Pr., 226; *Gooding v. McAllister*, 9 How., 123; *Zimmerman v. Shreever*, 27 Alb. Law Jour., 499.)

Our attention is called to *Van Leuven v. Lyke* (1 N. Y., 517), which was an action for trespass for injury to plaintiff's animals by defendant's animals, and the damages were described in the complaint, and it was not alleged or proven that defendant had knowledge of the vicious propensities of his animals. It was held damages could not be recovered. It does not aid the respondent here.

We have looked into the other cases cited by the respondent and do not find anything in conflict with the views already expressed. In case the plaintiff recovers less than fifty dollars for trespass, a different rule as to costs would be applicable than would prevail in an action where the recovery was for an assault and battery for less than fifty dollars. In case the causes of action are separately stated and numbered, confusion and difficulties in regard to the rule respecting costs may be avoided. (Code, §§ 3228, 3234.)

We think the order appealed from in this and the other eight cases should be reversed, with ten dollars costs and disbursements in one case, and the motion granted in all the cases, with ten dollars costs of motion in one case, plaintiff to serve amended complaints within ten days from the service of a copy of this order.

BOARDMAN and FOLLETT, JJ., concurred.

Orders reversed, with ten dollars costs and disbursements in one case, and the motion granted in all the cases, with ten dollars costs of motion in one case, plaintiff to serve amended complaints within ten days from the service of orders.

N. B.—Section 3228 of the Code of Civil Procedure is quoted in *Langdon v. Guy*, p. 264, of this volume.

Section 3234 is as follows: In an action specified in section three thousand and two hundred and twenty-eight of this act, wherein the complaint sets forth separately two or more causes of action upon which issues of fact are joined, if the plaintiff recovers upon one or more of the issues, and the defendant upon the other or others, each party is entitled to costs against the adverse party, unless it is certified that the substantial cause of action was the same upon each issue; in which case the plaintiff only is entitled to costs. Costs to which a party is so entitled must be included in the final judgment by adding them to, or offsetting them against, the sum awarded to the prevailing party; or otherwise, as the case requires. But this section does not entitle a plaintiff to costs in a case specified in subdivision fourth of section three thousand two hundred and twenty-eight of this act, where he is not entitled to costs, as prescribed in that subdivision.

Buckel v. Suss, 28 Abb. N. C., 27.

BUCKEL v. SUSS.

New York Superior Court, Trial Term, 1892.

[Reported in 28 Abb. N. C., 27.]

[*Husband and wife; action for enticement.*] A wife's action for damages for the enticing away of her husband, is based upon the loss of the *consortium* or conjugal society of her husband, and is not maintainable where the wife has voluntarily left her husband and lives apart from him under a separation agreement entered into under sanction of the court.*

1

Motion for new trial.

This action was brought by Elizabeth Buckel against Anna Suss to recover damages for enticing away plaintiff's husband and wrongfully depriving plaintiff of the "comfort, society, consort, aid and assistance of her said husband." The complaint alleged that the acts occurred in and about the month of May, 1885, while the plaintiff was living and cohabiting with her said husband in the city of New York and while they were living together as man and wife. The answer denied the material allegations of the complaint, alleged the consent and privity of the plaintiff to the acts complained of, and set up the statute of limitations. At the conclusion of the evidence on both sides, the complaint was dismissed. Further facts are fully stated in the opinion.

2

3

McADAM, J. The plaintiff is concluded by the nature of her action as set forth in the complaint, which is for "enticing away the plaintiff's husband," and the form of complaint used is that found in 1 Abbott's Forms, p. 504, No. 608. It is not for "crim. con." in which the words "debauched and carnally knew" are necessary allegations. (McCall's Forms, 3d ed., p. 270, No. 435; 1 Abbott's Forms, p. 504, No. 609.) So considered, the plaintiff is without a cause of action, for, according to her own testimony, she cohabited with her husband, until, by the advice of her counsel, she left his home, hired rooms in another house, and brought an action in the Supreme Court for a limited

* See note at the end of this case.

divorce which resulted in July, 1888, in an agreement for separation, by and with the sanction of the court, whereby her husband agreed to pay her alimony at the rate of \$1,000 per year, payable monthly. While the wife's right to maintain an action for enticing away the husband is now affirmatively established in this state (Bennett v. Bennett, 116 N. Y., 584), the enticing must be clearly proved. An action for harboring a husband or wife is maintainable without the element of "crim. con." (2 Hilliard on Torts, 4th ed., 510), but the harboring means something more than receiving a visit or casually entertaining a guest; it means some act or influence by which the husband or wife is induced to remain away from home, or encouraged in some manner to desert the companionship of his or her life partner. (Warner v. Warner, 17 Abb. N. C., 224.)

There was no enticing away of the plaintiff's husband, but a voluntary departure from him by the plaintiff, followed by the agreement for separation, "by judicial sanction," in July, 1888, the consequence of which is to discharge the defendant from all liability for harboring the plaintiff's husband, if her conduct rises to the gravity of such an offense. This results from the nature of the damages recoverable and the effect of a legal separation upon marital rights.

The damages recoverable are for the loss of the "society, comfort and assistance" of the husband or wife. (Selwyn's N. P., 6; Bigelow on Torts, 153; Bennett v. Bennett, *supra*.) Where the wife sues, she must rely upon the loss of *consortium* or conjugal society of the husband (*Id.*), and these things are renounced by a legal separation (Reeves Dom. Rel., Ed. of 1867, p. 175), for while united in form, the parties are divided in fact; "they are thrown upon society in the undefined and dangerous character of a wife without a husband and a husband without a wife." (Evans v. Evans, 1 Hagg. Cons. R., 36, 37.) The spirit of the marriage contract, all that dignifies and ennobles it, is gone; the letter alone remains.

For the reasons stated, voluntary contracts for separation have in many cases been held illegal, unless entered into after actual separation, and made through the intervention of a trustee, or by sanction of the court. A deed of separation executed in con-

Buckel v. Suss, 28 Abb. N. C., 27.

- 8 temptation of and as an inducement to a *future* separation is void. (*Florentine v. Wilson*, Hill and D. Supp., 303.) This is because the law does not encourage husbands and wives to separate. Although a contract for future separation is void, it is valid if made after separation. (*Galusha v. Galusha*, 116 N. Y., 635; *Allen v. Affleck*, 64 How. Pr., 380.) Judge COWEN, in *People v. Mercien* (3 Hill, 410), calls these articles "a kind of divorce which the courts cannot very well, at this day, gainsay." In other words, whenever legal ground for separation exists, the parties may agree to it without compelling the court to hear
- 9 the grievance and award a decree, for what the court would be required to do, the parties may themselves do. An agreement of separation, followed by an immediate actual separation, is valid, and the covenant on the part of the husband to pay installments to a trustee for the support of the wife and their children, is enforceable in an action by the trustee (*Clark v. Fosdick*, 118 N. Y., 7; s. c. 27 State Rep., 750; 28 *id.*, 349); and, in the absence of a provision in the agreement to that effect, the act of the wife in subsequently obtaining a divorce, no alimony being
- 10 awarded, will not terminate the obligation of the husband to pay the installments. (*Ib.*)

The case was tried on the theory that the separation between the plaintiff and defendant was by decree of the court. It appears now that it was effected by agreement, under sanction of the court. The legal result is in either case the same, and the circumstances required no more than passing notice, although technically the plaintiff is *bound by the theory* on which the case was tried. (*Frear v. Sweet*, 118 N. Y., 454.)

- 11 In *Weedon v. Timbrell* (5 T. R., 357) it was ruled by Lord Kenyon that actions of this description, being founded on the injury which the husband has sustained in the deprivation of the comfort, society and assistance of his wife (an allegation to that effect being always inserted in declarations of this kind as being material and substantial), the consequence must be that when the husband voluntarily relinquishes the comfort, society and assistance of his wife, by consenting to a separation from her, he can suffer no loss from her incontinency whilst such separation continues. (See *Bright on Husb. and W.*, 351; *Fry v. Derstler*, 2

Distinction between an Action for Enticing Away and Harboring.

Yeates, 278; Roper Hus. and Wife, 322; Bartelot v. Hawker, 12 Peake N. P. C., 11*; Hodges v. Windham, *ib.*, 39*; 4 Vin. Ab., 173; 2 Stark Ev., 698; Shelf on Mar. and Div., c. 6, p. 608.)

If the action had been brought for "crim. con.," *i. e.*, corrupting the mind and affection of the plaintiff's consort, a brief review of rules regulating such actions and the authorities in regard thereto, to which attention has been called by the plaintiff's counsel, might have been necessary; but as "crim. con." is not charged, these matters, like the "flowers that bloom in the 13 Spring, have nothing to do with the case," and require no comment. The motion for a new trial must be denied.

NOTE ON THE DISTINCTION BETWEEN AN ACTION
FOR ENTICING AWAY AND HARBORING A
WIFE OR HUSBAND AND ONE FOR
CRIMINAL CONVERSATION.

The distinction between the two actions is so well defined that a suit for 1
enticing away the wife and the recovery of a judgment therein will not bar a separate action by the husband for "crim. con." (*Schnell v. Blohm*, 40 Hun, 378).

While one action may comprehend the two subjects, there are many cases which do not comprehend both. For example, the father of a female, believing her to have been ill treated by the husband, may invite her to return to his home, and may keep her there. This might be a case of enticing away and harboring (see *Barnes v. Allen*, 1 Abb. Ct. App. Dec., 111, rev'g 30 Barb., 603), but clearly not of crim. con., which consists in the act of corrupting the mind and body. The preceding opinion treats fully the question of enticement. The question of crim. con. involves other considerations. 2

Buller says: "The action lies for the injury done to the husband in alienating the wife's affections; destroying the comfort that he had from her company; and raising children for him to support and provide for." (*Buller's N. P.*, 26.) The injury has always been described as committed with force and constraint, the wife having no power to consent. (2 Chitty, p. 641, n.; *Selwyn's N. P.*, 10.) In form, it is an action for trespass *vi et armis*; but, in substance, an action on the case for the seduction of the wife, the alienation of her affections from her husband, and exposing him to shame, ridicule, and the hazard of maintaining a spurious issue. It proceeds upon the fiction that a wife has no will, and could not have consented to the adultery. (*Reeves Dom. Rel.*, Ed. of 1867, p. 139.) The hus-

 Distinction between an Action for Enticing Away and Harboring.

- 3 band's right to recover against the wife's seducer is not barred by his continuing to live with her after knowledge of her infidelity, and the reason given is that the husband may forgive his wife, and yet he may not forgive the author of her defilement, and of his loss, wrong and injury. (*Sikes v. Tipples*, 42 Alb. L. J., 177.)

Benj. V. Abbott, in his law dictionary, describes the action as "the tort of debauching or seducing of a wife;" and the offence of persuading away a person's wife was made indictable in England. (8 Edw. I, c. 18; 3 Black. Comm., 189.) The woman was evidently supposed to be the weaker vessel, for no safeguards were thrown around the husband, who was regarded as the master and the man, capable of protecting himself. Indeed, the law seemed to regard the masculine as the seducer, the
 4 feminine or wife, the victim; so much so that in nearly all legal works the subject of "crim. con." is considered under the head of seduction. "Crim. con." may, therefore, be accepted as a species of seduction in which the arts and wiles and designs of the seducer play a prominent part. If force is actually used, the real offence is "rape," and it is by reason of the incapacity alone of the wife to consent (as against the husband) that "crim. con." has ever been regarded as trespass *vi et armis*, a fiction that has caused much difference of opinion among law writers as to whether the injury which is clearly consequential should be technically denominated "case" or "trespass."

The action has been considered one of trespass (Selwyn's N. P., 10), yet in effect it is in case (*Macfadzen v. Olivant*, 6 East, 887; *Sanborn v. Neilson*,
 5 5 N. H., 314), the wrong not being immediate, but consequential. Either form of action may be adopted, however, case being preferred by some authors. (2 Hilliard on Torts, 4 ed., 506, 507.) The theory that the woman was the seduced and the man the ravisher *vi et armis*, so impressed itself on these actions that it was for a long time supposed that a wife could not maintain "crim. con.," and it was so held in *Van Arnum v. Ayres* (67 Barb., 544); *Logan v. Logan* (77 Ind., 558), and other cases. In England the question is still unsettled. (*Lynch v. Knight*, 9 H. L., 577.) In this state the wife's right to maintain the action is now affirmatively established. (*Bennett v. Bennett*, 116 N. Y., 584.)

Schofield v. Whitelegge, 12 Abb. Pr. (N. S.), 320.

SCHOFIELD v. WHITELEGGE.

New York Court of Appeals, 1872.

[Reported 12 Abb. Pr. (N. S.), 320.]

In an action to recover the possession of personal property wrongfully detained, the complaint must allege a general or special ownership in the plaintiff. ✓

Appeal from a judgment. 1

Cyrus Schofield sued James H. Whitelegge in the New York Superior Court, to recover the possession of personal property.

The allegations of the complaint were as follows :

"The above-named plaintiff, for a complaint in this action, alleges that the above-named defendant has become possessed of and wrongfully detains from this plaintiff the following property, that is to say: one rosewood Ernest Gabler piano, No. 6604 (Ernest Gabler, maker), of the value of four hundred dollars.

"Wherefore the plaintiff demands judgment against the said defendant for a return, and for damages," etc. 2

The answer was a specific denial.

At the trial the complaint was dismissed as not stating facts sufficient to constitute a cause of action.

The Court at General Term affirmed the judgment (reported in 10 Abb. Pr., N. S., 104).

Plaintiff appealed.

The Court of Appeals affirmed the judgment.

FOLGER, J. The complaint in this action does not, in terms show any right or title in the plaintiff upon which the former action of replevin would lie. That action could be maintained only by one who had the general or a special property in the thing taken or detained. That property must have been averred in the declaration, or it would not have sufficed the plaintiff's purpose. (*Pattison v. Adams*, 7 Hill, 126. See also *Bond v. Mitchell*, 3 Barb., 304; *Vanderburgh v. Valkenburgh*, 8 *id.*, 217.) 3

The chapter of the Code of Procedure, of "The Claim and Delivery of Personal Property," was intended to supply the pro-

Schofield v. Whitelegge, 12 Abb. Pr. (N. S.), 320.

4 visional relief which was theretofore obtained in the action of replevin. (See Commissioners' Report, p. 169.) There was no intention to change the requisites to maintain the action. There was no change made. Indeed, the Code, as reported, expressly required an affidavit from the plaintiff, where a delivery was to be made, that he was the owner of the property, or lawfully entitled to the possession thereof, by virtue of a special property therein. (Commissioners' Report, p. 170, § 182, subd. 1.) And so it now is (Code, § 207).^{*} Nor is it less necessary now than
5 formerly for the plaintiff to aver the facts which constitute his cause of action. He must allege facts and not evidence. He must allege facts and not conclusions of law. The plaintiff here alleges that the defendant wrongfully detains from him the chattel in question. If indeed that be true, then it must be that the plaintiff has a general or special property in the chattel and the right of immediate possession. But unless he has that general or special property and right of immediate possession, it cannot be true that it is wrongfully detained from him. The last, the wrongful detention, grows from the first, the property, and the right of
6 possession. The last is the conclusion. The first is the fact upon which that conclusion is based. It is the fact which in pleading must be alleged. Where facts are stated in a pleading which militate with a conclusion of law therein stated, the statement of facts will prevail. (*Jones v. Phoenix Bk.*, 8 N. Y. [4 Seld.], 228; *Robinson v. Stewart*, 10 *id.* [6 Seld.], 189). And is not the statement of a conclusion of law, without a fact averred to sustain it, an immaterial statement?

7 The plaintiff says that the defendant wrongfully detains from him the piano. The fact involved in that statement is that he detains it. Granted, then, that he detains it, why is it wrongful? Because the plaintiff is the owner by general or special right of property, and entitled to the immediate possession. But these are the facts which are to be shown. They have not been averred. How then can they be shown? The plaintiff claims, however, that the averment in the answer denying the detention and denying ownership in the plaintiff, puts in issue these facts, and that the defect in the complaint is cured by that averment.

^{*} For the present statute, 1895, see Code Civ. Pro., § 1690, etc.

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He cites *Bate v. Graham* (11 N. Y. [1 Kern.], 237). But there 8
the allegation in the answer was the affirmation of the very fact
which it was objected the complaint should have averred. There
the omission from the complaint was of an allegation that the
defendant maintained that a certain assignment of an insolvent
debtor was not fraudulent. The answer of the defendant made
the very averment which was omitted from the complaint, and
the omission of which was the ground of the defendant's objec-
tion to the complaint. The court well held that the complaint
might have been amended, for both parties at the trial were
maintaining the same fact. Here, however, the parties do not 9
seek to maintain the same fact; and that which the answer avers,
is the direct opposite of that which the plaintiff must establish to
recover. Would the plaintiff take the averment of the answer
into his complaint as a part of its allegations? Then he would
allege that he is not the owner of the property, and that the
defendant has not detained it from him. And then his com-
plaint would show him without cause of action. (See *Pelton v.*
Ward, 3 Caines, 73.)

The same considerations are applicable to the lack of the aver- 10
ment of a demand and refusal, if the plaintiff's case is to depend
upon a wrongful detention, without a wrongful taking in the
first instance. The case of *Levin v. Russell* (42 N. Y., 251) is
cited by the appellant. There are two facts which make it inap-
plicable here. There was in it no motion to dismiss the com-
plaint for its insufficiency, and proof was made at the trial,
without objection of facts, making a cause of action.

Again; the complaint did not allege that the property was
that of the plaintiff. This does not appear in the report of the 11
case in 42 N. Y.; and from the statement there one would think
that the complaint was without an allegation of the plaintiff's
ownership. On referring to the printed case, as it is found in
the series of bound volumes of cases in this court, in the state
library, the averment reads thus: "The following goods and chat-
tels of the plaintiff." This is in exact accordance with a prece-
dent for a declaration in replevin. (*Pattison v. Adams, supra.*)

The judgment should be affirmed, with costs to the respondent.
udges concurred.

Halsey v. Gerdes, 17 Abb. N. C., 395.

HALSEY v. GERDES.

N. Y. Supreme Court, First District, Special Term, 1886.

[Reported in 17 Abb. N. C., 395.]

1. A complaint in ejectment alleging that the plaintiff is seized in fee of the premises in question, that defendants are in possession thereof and withhold the same from the plaintiff is sufficient on demurrer.
2. The averment of seizin in fee is equivalent to an averment of the right to immediate possession, and therefore the defendant's possession and withholding are necessarily wrongful, and an allegation to that effect is not required.*

1 Demurrer to complaint.

Fanny Halsey sued John F. Gerdes in ejectment for certain premises in the city of New York.

The complaint alleged "That the plaintiff is seized in fee of the following described premises (describing them). That the defendants are in possession thereof and withhold the same from her," and demanded judgment: I. For the possession of said premises. II. For the sum of \$1,000, plaintiff's damages by the withholding of the same."

- 2 BARRETT, J. The case upon which defendants rely (*Moore v. Lehman*, 52 Super. Ct. [J. & S.] 283), is not supported by the authorities. It is well settled that an allegation of "seizin in fee," followed by an averment of an unlawful withholding, is sufficient on general demurrer. (*Ensign v. Sherman*, 14 How. Pr. 439; *Sanders v. Leavy*, 16 How. Pr., 308; *Walter v. Lockwood*, 23 Barb., 228.) Here the word "unlawfully" is omitted, but it may be treated as a conclusion of law or as surplusage. (*Payne v. Treadwell*, 16 Cal., 220.) The averment of seizin in fee is equivalent to an averment of the right to immediate possession. (1 Washb. Real Prop., 58; *Jenkins v. Fahey*, 73 N. Y., 355, 361, and cases there cited; *Bouvier's Law Dict.*; *Abb. Law Dict.*) The plaintiff being entitled to immediate possession, as implied from the seizin in fee, the defendant's possession and withholding are necessarily wrongful. If otherwise, they must
- 3

* *Moore v. Lehman* (52 Super. Ct. [J. & S.], 283), and *Alvord v. Hetsel* (Supm. Ct., Montgomery Sp. T., 2 How., Pr. N. S., 88) are to the contrary.

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set up the facts from which they claim the right to withhold 4
and retain possession.

The demurrer must be overruled with costs, and with leave
to defendants to answer within twenty days upon payment of
such costs.

CLASON v. BALDWIN.

New York Court of Appeals, 1891.

[Reported in 129 N. Y., 188.]

1. When title is shown to have been derived from a person whose title and whose right to possession is not disputed, it is in intendment of law, accompanied by a right of possession which secures to the apparent owner constructive possession and the right to recover it by an action of ejectment, from a person withholding it without title. [*This point was discussed and ruled below, and though not directly discussed on appeal was involved and necessarily confirmed in the affirmance.*]
2. The premises in suit in ejectment were occupied by tenants, and not by the defendant herself, and only the latter was made a party. *Held*, that notwithstanding the provisions of Code Civ. Pro., § 1502, the non-joinder must be set up by answer; and defendant's failure to do so waived her objection.
3. Under the provisions of the Code of Civil Procedure a claim for rents and profits subsequent to the commencement of the action is recoverable in ejectment under the allegation of damages for the withholding of possession.

Action in the nature of ejectment, brought under the N. Y. 1
Code of Civil Procedure.

The allegations of the *complaint* were:

1st. That the plaintiff is seized in fee and entitled to the immediate possession of the following described premises, viz.: [*Here the complaint contained a description as in a deed.*]

2d. That the defendant wrongfully withholds the possession thereof from said plaintiff. 2

WHEREFORE, the plaintiff demands judgment:

1st. For the possession of said premises.

2d. For the sum of \$5,000, the plaintiff's damages for the withholding of the same, besides costs.

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3 The contents of the *answer* were :

The defendant for answer :

Denies each and every allegation in said complaint contained.

And for a second separate and further defence this defendant alleges that neither the plaintiff nor her ancestors, predecessors or grantors were seized or possessed of the lands and premises described in the complaint, or any part thereof within twenty years before the commencement of this action.

4 WHEREFORE, defendant demands judgment dismissing the complaint with costs.

At the trial the jury found a verdict as follows: That the plaintiff is the owner of the fee and entitled to the possession of the premises: and found as damages for the withholding of the same the sum of \$3,942.50.

The General Term of the Supreme Court, while of opinion that the record title was sufficient as establishing constructive possession, and that defendant's omission to plead the non-joinder of the actual occupant waived the objection of non-joinder; yet
5 held that damages for withholding possession could not be recovered unless especially alleged in the complaint, citing *Larned v. Hudson*, 57 N. Y., 131.

On this point the Supreme Court said :

“ It is as important that the right to recover the damages after the action has been commenced should be made to appear by the complaint, as it is that it should lay the foundation for such damages as accrue previous to the event, to entitle the plaintiff to recover them. The defendant was to be informed of the fact, to supply her with an opportunity to be prepared with proof, if
6 that could be obtained, to contest it upon the trial. That was not secured in this instance. And both the evidence proving the damages and the ruling allowing their recovery were erroneously sanctioned at the trial. [Reported in 37 State Rep., 213.] The Supreme Court therefore reversed the judgment as to those damages.

Both parties appealed, plaintiff claiming the reversal as to damages to be error, and the defendant claiming that the rulings against him were error.

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The Court of Appeals modified the judgment. 7

GRAY, J. This action was for the recovery of the possession of certain real property in New York City, and judgment was entered by the plaintiff upon a verdict which awarded that recovery and also a sum of money as the rental value of the premises from the commencement of the action to the day of trial. The General Term affirmed so much of the judgment as gave to the plaintiff the possession of the premises; but reversed that portion of it which awarded damages for the withholding of the possession. Both parties have appealed to this court. 8

Upon the defendant's appeal, the objection discussed by her counsel is that the complaint should have been dismissed, because the defendant was not the actual occupant of and was not proved to have claimed any interest in the premises at the time of the commencement of the action, and that possession was not shown in the plaintiff or her ancestors.

We are quite satisfied with the disposition which was made by the General Term of this objection, and but a brief review of the principal point is called for. As an action to recover real property, the contest is necessarily over the title to it, and while § 1502 of the Code of Civil Procedure requires that, where the complaint demands immediate possession, the occupant of the property must be made defendant in the action, the following section provides that any other person claiming title to, or the right to the possession of, the property as landlord, etc., may be joined as defendant in the action. In this case the defendant's tenants occupied the premises, when the action was commenced, and might have been made parties defendant; and they must have been made so, in order that a judgment of possession might be executed. But not having made the tenants defendants and electing to sue the landlord alone, it followed that the issue for trial was that raised by the pleadings. The landlord was a proper party, and if she omitted to object to the defect of parties in the way provided for by the Code, in this case by answer, as the defect did not appear on the face of the complaint, the effect was to leave the action to be tried upon the question of the plaintiff's title and right to the possession. 9 10

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- 11 No decision, that I am aware of, in this court militates against this view.

If the plaintiff in ejectment does not sue the tenant, but does his landlord, and the latter joins issue and, by his omission to so plead, waives the defect of non-joinder of the tenant, the consequence is that a recovery of the land cannot be enforced as against the tenant's occupancy; but the judgment has determined the title to the land, as between the parties, to be in the plaintiff. Here the complaint simply alleged plaintiff's seizin in fee and her right to the immediate possession of the described property,
12 and that the defendant wrongfully withheld its possession from the plaintiff. The landlord, the sole defendant, in answering, denied each of these allegations and set up a new defence of the statute of limitations.

Thus, while a necessary party under the Code may have been omitted as a defendant, a proper party to the action, in the person of the landlord and one whose presence was necessary for the determination of the questions of title, was a defendant, and she elected to appear and defend alone upon the issue made
13 as to plaintiff's title and right to the land and that she, the defendant, was wrongfully withholding its possession. There was no error in holding her, upon the trial, to the issues as then presented. The case of *Finnegan v. Carraher* (47 N. Y., 493) is quite in point upon the question.

Upon the question of defendant's possession of the premises in question there was sufficient evidence of acts of ownership to warrant the submission of the question to the jury, and it was settled by their verdict. As to the legal title of the plaintiff it is unnecessary to add to the opinion of the General Term.

14 Upon the plaintiff's appeal the question is presented as to her right to recover damages for the withholding of the possession, measured by the annual rental of the premises from the date of the commencement of the action to the time of the trial. This question the General Term has determined adversely to the plaintiff, holding, on the authority of *Larned v. Hudson* (57 N. Y., 151), that such a cause of action should have been set out in the complaint and that it was not sufficient for their recovery that damages were included in the demand for judgment.

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Hence, they held it was error to admit evidence of such damages 15 and for the trial court to rule that they might be recovered, and, *pro tanto*, they modified the plaintiff's judgment.

In so holding I think the General Term have misapprehended the effect of the changed provisions of the Code of Civil Procedure. *Larned v. Hudson* did hold that a claim for damages for the withholding of the possession was distinct from a claim for rents and profits during the time; but the ruling in that case was expressly based upon the provision of the then existing Code, the 167th section of which permitted to be united in the same complaint several causes of actions arising in such a case 16 out of "claims to recover real property, with or without damages for withholding thereof, and the rents and profits of the same." That language, it was held, recognized the fact that a claim for damages for withholding real estate, demandable and recoverable in an action for the recovery of the land itself, does not include, but is distinct from a claim for the rents and profits of it during the time the possession is wrongfully withheld. In enacting the present Code of Civil Procedure, section 167 was replaced by section 484, and the subdivision of the old section 17 167, referred to, was modified so as to leave out from it the words, "and the rents and profits of the same." The omission of this part of the former subdivision after the court in *Larned v. Hudson* had given to it such significance, when considered in connection with the enactment of present sections 1496 and 1497, must be taken to indicate the intention of the Legislature to modify the rule as deduced from section 167. Those sections occur in the article entitled as "action to recover real property." Section 1496 provides that in such an action "the plaintiff may demand in his complaint and, in a proper case, recover damages 18 for withholding the property." Section 1497 then reads: "Those damages include the rents and profits or the value of the use and occupation of the property when either can legally be recovered by the plaintiff."

These sections were new enactments and I cannot perceive any particular usefulness in the change, unless to obviate the effect of the construction placed upon section 167 of the old Code. I think the effect of these sections is to make all the

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19 recoverable damages incidental to the establishment of the plaintiff's title to the property. While formerly that damage for withholding the possession, which was regarded as an element of mere injury, was incidental to the recovery of the title, and a claim for rents and profits, or for the value of the use and occupation, was a distinct and separate claim; under the present procedure, if the plaintiff recovers the judgment establishing his title, the incidental damages which he may then recover under his demand do include the rents and profits, or the value of the

20 use and occupation. These latter items of damage are to be computed from the commencement of the action brought to recover the property. I doubt that these sections of the present Code would authorize a recovery of rents and profits, or of the value of the use, as a part of the damages, for a time prior to the commencement of the action. That perhaps would be stretching their significance as a rule of recovery, but as a part of the damages for continuing to withhold the real property after the bringing of the action I think the plain reading of the

21 sections warrants the recovery under the demand. The commencement of the action, with the demand in the complaint for damages for the withholding of the possession, was sufficient to apprise the defendant to prepare to meet the plaintiff's proofs as to all the damages which the withholding comprehended in fact. The evidence upon the trial, therefore, was competent; its admission was not error and the instruction of the trial judge was correct.

So much of the judgment of the General Term as modified the judgment entered upon the verdict of the jury should be

22 reversed, and the judgment so entered should be affirmed, with costs to the plaintiff at the General Term and in this court.

All the judges concurred.

Judgment modified and, as modified, affirmed.

Ensign v. Nelson, 21 Abb. N. C., 321.

ENSIGN v. NELSON.

*New York Supreme Court, General Term, First Department ;
June, 1888.*

[Reported in 21 Abb. N. C., 321; s. c. 49 Hun, 216.]

1. In an action for an accounting upon an agreement by which the defendant was to secure advertising contracts to be turned over to the plaintiff for performance by him, the profits to be equally divided; and under which agreement the defendant collected the amounts due upon the contracts and failed to account therefor with the plaintiff, although he had agreed to do so,—*Held*, that the facts authorized an order of arrest against defendant—a non-resident—pursuant to Code Civ. Pro., § 550.*
2. Where the plaintiff has a right to require defendant to account in the action, right to arrest is not impaired by the fact that the balance to be recovered by *final* judgment could be collected by execution; for a direction of the court that defendant state and file an account, if not obeyed, is enforceable by proceedings for contempt.†
3. An interlocutory judgment containing such a direction would be within the meaning of Code Civ. Pro., § 550—providing that a defendant may be arrested in an action wherein the judgment demanded requires the performance of an act the neglect or refusal to perform which would be punishable as a contempt.*
4. An order of arrest under Code Civ. Pro., § 550, is a substitute for the writ of *ne exeat*, which was abolished by Code Civ. Pro., § 548.

Appeal from an order denying a motion to vacate an order of arrest and from an order allowing the submission of the plaintiff's complaint as new proof to oppose the motion to vacate. 1

The plaintiff, Herman L. Ensign, commenced this action against the defendant, Frederick Tracy Nelson, to obtain an accounting of moneys alleged to have been received by the defend-

* Code Civ. Pro., § 550, is as follows: "A defendant may also be arrested in an action wherein the judgment demanded requires the performance of an act the neglect or refusal to perform which would be punishable by the court as a contempt, where the defendant is not a resident of the State, or, being a resident, is about to depart therefrom, by reason of which non-residence or departure there is danger that a judgment or an order requiring the performance of the act will be rendered ineffectual."

† See note to case of *Blanchard v. Jefferson*, *post*, as to the distinction between an action on an account, and an action for an accounting.

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- 2 ant, and as to which the plaintiff alleged that a positive balance thereof would be found to be due to the plaintiff upon an accounting.

The plaintiff obtained upon a summons and affidavits, and undertaking, an order of arrest against the defendant, pursuant to Code Civ. Pro., § 550, on the ground that the defendant was a non-resident, and that by reason of such non-residence there was danger that a judgment or order requiring the defendant to account would be rendered ineffectual.

- 3 The said affidavits and the complaint alleged in substance that the plaintiff and defendant entered into a written agreement, whereby the defendant was to secure advertising contracts and turn them over to the plaintiff for execution; that they were to share the profits equally; that the defendant procured four advertising contracts which the plaintiff executed, making all the necessary disbursements, to which the defendant contributed nothing; that the defendant had collected certain specified amounts due upon the said contracts, but that the plaintiff had no knowledge as to how much more the defendant had collected;
- 4 and that it had been agreed that the defendant should render an account of the said collections as soon as made, but that although duly demanded he had never rendered any account thereof to the plaintiff; and the complaint demanded judgment, (1) as an interlocutory judgment, that the defendant be decreed to render an account of the moneys collected, and to produce all the vouchers in his possession or under his control, relating to said collections; (2) that plaintiff have final judgment for the amount which might be found due him.

- 5 The plaintiff's affidavits further showed that the plaintiff made diligent but unavailing efforts to find the defendant within this State for a period of over a year prior to the arrest; and also alleged facts tending to show want of good faith on the part of the defendant in failing to render any account.

The defendant was arrested under the order, after which he moved to vacate the same upon the ground that the order was illegal and void because of the alleged insufficiency of the affidavits (on which it was made) to constitute such an action as would warrant the granting of such an order.

He also submitted an affidavit in support of the motion to vacate, stating that he had demanded an account of the transactions of the business from the plaintiff, who had refused to furnish it; and that he was employed in New York City by a firm thereof, and resided in Philadelphia. 6

The motion came on for a hearing, and after its submission, but before the decision thereof, the plaintiff moved to be allowed to submit the complaint in the action as a part of the papers, in opposition to the motion to vacate, which motion the defendant opposed. 7

The Court at Special Term denied the motion to vacate the order of arrest, and granted the motion allowing the submission of the complaint as a part of the motion papers, in opposition to the defendant's motion to vacate the order of arrest, but rendered no opinion.

From both of these orders the defendant appealed.

The Court at General Term affirmed the decision.

DANIELS, J. The order of arrest was made by the court under section 550 of the Code of Civil Procedure. This authorizes the court to make the order in an action wherein the judgment demanded would require the performance of an act the neglect or refusal to perform which would be punishable by the court as a contempt, and the defendant is not a resident of the State, or, being a resident, is about to depart therefrom, by reason of which non-residence or departure there might be danger that the judgment or order requiring the performance of the act would be ineffectual. The action was brought for an accounting upon an agreement between the parties, by which the defendant agreed to secure the exclusive control of the advertising of responsible parties, and to turn over their contracts to the plaintiff for performance by him, the parties agreeing to share equally the net profits which might accrue from the advertising begun and executed in that manner. It was stated in the affidavits that the contracts had been obtained for printing and had been performed under this agreement, and that the defendant had collected the amounts due for the services rendered, and had failed to account with the plaintiff concerning the same. It was also stated that 8 9

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10 the defendant did not reside within this State, but was a resident of Philadelphia, in the State of Pennsylvania.

These facts presented a presumptive right of action against the defendant and a case in which an order for his arrest and detention might be made by the court. And it did not follow, because the balance recovered by the judgment could be collected by execution, that the defendant could not be arrested under the order.

Whether the parties are to be regarded strictly as partners
11 between themselves, or as persons engaged in a joint enterprise for mutual profit, under the agreement which they entered into, is not important, for, in either view, an action for an accounting could be maintained by the plaintiff against the defendant (*Marston v. Gould*, 69 N. Y., 220, 224, 225). And in the regular course of proceeding in the action the defendant could, and ordinarily would, be required to present and file a statement of the business and of the accounts (*Hathaway v. Russell*, 7 Abb. N. C., 138; affirmed in 46 Super. Ct. [J. & S.], 103).

The practice in an action for an accounting was there con-
12 sidered, and the conclusion was sustained, upon authority, that the defendant, under the present system, could be required, as he was under the preceding practice in chancery, to state and file an account of the business and transactions of the firm, or of their joint adventure. And where that direction may be given, and the defendant fails to comply with it, then it could regularly be enforced by the court, by the punishment of the party failing to comply, for a contempt. The direction would regularly be given by an interlocutory judgment, which would be a judgment within the language of subdivision 4 of section 550 of the Code
13 of Civil Procedure;* for the term judgment, as it was there used, includes either an interlocutory or final determination of the rights of the parties (Code of Civil Procedure, § 1200).

The order of arrest in this class of cases is a substitute for the writ of *ne exeat*, which has been abolished by the Code. And it is authorized by section 550 of the Code in an action of this description, and so was a *ne exeat* held to be in cases arising in

* As the statute now stands, subdivision 4 of § 550, here referred to, is all that remains of that section.

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courts of equity (*Meyer v. Meyer*, 25 N. J. Equity, 28; *Dean v. Smith*, 23 Wis., 483). 14

The defendant moved to vacate the order, not only upon the alleged insufficiency of the affidavits on which it was made, but also on an affidavit of his own, stating that he had demanded an account of the transactions of the business from the plaintiff, who had refused to furnish it, and that he was in the employ of Munn & Co., in the city of New York, although a resident of the City of Philadelphia. This affidavit, although briefly stating additional facts, vested the plaintiff with the right, under section 568 of the Code of Civil Procedure, to oppose the application for the discharge of the order, by new proof tending to sustain any ground of arrest recited in the order, and such additional proof was produced upon the hearing, but not materially changing the case as it had been before presented. After the argument of the motion, and its submission to the court, an application was made on behalf of the plaintiff for leave to add the complaint to the additional proofs produced, and after the hearing of the defendant upon that application, the order was made allowing the complaint to be submitted. 15. 16

This the court evidently had the power to do, inasmuch as the motion remained undecided, and the complaint was received only as an additional affidavit tending to sustain the order of arrest.

[*The rest of the opinion does not relate to the question of pleading.*]

Williams v. Lindblom, 68 Hun, 173.

WILLIAMS v. LINDBLOM.

N. Y. Supreme Court, First Dept., General Term, 1893.

[Reported in 68 Hun, 173.]

1. Pleadings are to be construed strictly against the pleader, and if it cannot be determined what has been denied, none of the allegations of the complaint will be deemed to have been controverted.
2. The method of denying allegations contained between specified folios condemned.
3. In an equitable action between partners, for an accounting, a personal judgment for a sum of money cannot be entered against one partner in favor of the other without determining the state of the accounts between them.
4. In such an action the objection to such a judgment may be taken on appeal although the appellant made no specific request at the trial that the accounts between the partners be stated, since counsel had the right to assume that a judgment would be rendered appropriate to the form of the action.

1 Suit in equity for a partnership accounting.

The Referee's decision gave judgment for a definite sum of money in favor of one partner against the others without determining the state of the accounts.

The General Term of the Supreme Court reversed the judgment.

- FOLLETT, J. The answer of Lindblom is so defective that had the decision turned upon the state of the issues presented by the pleadings, the defect might have proved fatal to the defendant.
- 2 The answer "denies the allegations contained in said complaint from the middle of the ninth folio down to the words 'anyone therefore,' near the end of the twelfth folio of said complaint, except," etc. The folios referred to are evidently those of the original complaint, which are not identical with those of the complaint as printed in the record, and it is impossible to ascertain what is denied and what admitted. This vicious mode of pleading has been several times condemned in reported cases. (*Caulkins v. Bolton*, 98 N. Y., 511; *Baylis v. Stimson*, 110 *id.*, 621; *Crosley v. Cobb*, 3 How. Pr. [N. S.], 37; *Varnum v. Hart*, 47

Williams v. Lindblom, 68 Hun, 173.

Hun, 18-23; Avery v. N. Y. C. & H. R. R. Co., 29 State Rep., 918.) Pleadings are to be construed strictly against the pleader, and if it cannot be determined what has been denied, none of the allegations of the complaint will be deemed to have been controverted. 3

An action at law cannot be maintained by one partner against another to recover a sum of money arising out of the partnership transactions until a final accounting has been had and the amount due ascertained. The case at bar is in equity for an accounting between several partners, but by the decision of the referee and the judgment entered thereon it was, in effect, turned into an action at law, and a judgment for a definite sum of money entered in favor of one partner against two others, without determining the state of the accounts between the partners. 4

The rule for taking a partnership account in an action like this is well stated by Mr. Lindley in his learned work on partnerships:

- "1. Ascertain how the firm stands as regards non-partners.
2. Ascertain what each partner is entitled to charge in account with his copartners, remembering, in the words of Lord Hardwicke, that 'each is entitled to be allowed as against the other everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought.'
3. Apportion between the partners all profits to be divided or losses to be made good, and ascertain what, if anything, each partner must pay to the others, in order that all cross claims may be settled." (2 Lind. on Partnership [3d Eng. ed.], 1031.) 5

This rule has been approved by several cases in this State. (Neudecker v. Kohlberg, 3 Daly, 407; Rhiner v. Sweet, 2 Lans., 386; Butler v. Ballard, 11 J. & S., 191; Sweet v. Morrison, 103 N. Y., 235; McCall v. Moschowitz, 14 Daly, 16.) Such is the rule in New Hampshire (Raymond v. Came, 45 N. H., 201) and in Massachusetts (Paine v. Paine, 15 Gray, 299). The theory of this action was disregarded by the learned referee, whose decision and the judgment entered thereon violate the rule that judgments must be *secundum allegata et probata*. 6

It was urged on the argument that the defendant did not, by

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7 an appropriate request, ask the referee to state the accounts between the partners. This was unnecessary, for counsel had a right to assume that a judgment appropriate to the form of the action would be rendered, and it was no more necessary to make a specific request than it would be, in an action for a specific performance, to request that a judgment for money be not given, but that specific relief be awarded or denied.

8 The exeptions taken by the appellant to the conclusions of law are sufficient to raise the questions here considered. In accountings between partners, it is not usual to award costs until the final judgment is entered, when they may be paid out of the fund or charged against the delinquent partner, so the question of costs will be reserved until the final determination.

The judgment should be reversed, and a new trial granted before a new referee to be appointed by this court, with costs to appellant to abide the final award of costs.

VAN BRUNT, P. J., and O'BRIEN, J., concurred.

DALTON v. VANDERVEER.

Supreme Court, Special Term, 1894.

[Reported in 81 Abb. N. C., 430.]

1. Where the complaint alleges an equitable cause of action for the dissolution of a partnership and the appointment of a receiver, and the evidence presents only a cause of action for damages for a breach of a contract for services, the court cannot give judgment for damages, or allow the complaint to be amended, but must dismiss the action.
2. Defendant does not waive his right to a trial by jury by failing to demand the same, if the complaint does not set forth a cause of action triable by jury, but such a cause is for the first time disclosed by the evidence.*
3. Defendant is not bound to plead that plaintiff has an adequate remedy at law in order to render such defense available against a cause of action disclosed by the evidence, where the complaint set forth a cause of action which, if established, would have entitled plaintiff to equitable relief.

Trial by the court without a jury.

*See note at the end of this case.

Dalton v. Vanderveer, 81 Abb. N. C., 480.

The action was brought by George W. Dalton against John 1
H. Vanderveer.

The opinion fully states the facts.

GAYNOR, J. The complaint alleges in sum and substance that the defendant owned a tract of sixty-five acres of land, and in order to secure the experience and assistance of the plaintiff in laying it out in lots and streets, and selling it off by lots at auction or private sale, entered into an agreement of co-partnership with the plaintiff, whereby the plaintiff was given a certain interest in common with the defendant in the lands and the future proceeds 2
of sales thereof; that out of such proceeds the defendant was first to be paid the moneys expended in preparing the land for sale by lots, as aforesaid, the agreement requiring him to advance it all; and then \$3,000 an acre for the tract, after which the overplus, if any, should be divided between the parties, the plaintiff's share to be one-quarter; and that, after the plaintiff had so plotted and prepared the land for sale, and a large number of the lots had been actually sold, the defendant notified the plaintiff that he dissolved the partnership, and refused to go on 3
any further with the enterprise as a joint one; and the prayer is for a judgment declaring the plaintiff to be a part owner of the land, for the appointment of a receiver to sell the land, and for an accounting and division.

The answer denies the co-partnership, and alleges that the plaintiff was only the employee of the defendant.

The proof shows that there was no co-partnership, but that the plaintiff was employed as an agent by the defendant to prepare the land for sale and sell it, as aforesaid, and that for his services he was to be paid one-quarter of the overplus, as already stated; 4
and that, after the contract had been partly performed, a large number of sales having been made, the defendant discharged the plaintiff. The cause of action which the proof presents is, therefore, one for damages for breach of contract for services. The amount already realized from sales is easily ascertained. Past sales furnish evidence of the time and effort it would take to sell off all of the lots, and also of the price for which the lots can be sold, and it would not be difficult to otherwise prove

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5 their value ; so that no difficulty would be encountered in proving the damage which the plaintiff has sustained by the breach of the contract. In this state of the case, may the court go on and assess the damage in this action, or must the complaint be dismissed ? The complaint states a case which is within the jurisdiction of equity, and is not an action at law, but the evidence fails to sustain the complaint, and also fails to make out any case which is within the jurisdiction of equity. This being so, must not the complaint be dismissed ?

6 The origin of the High Court of Chancery in England was due wholly to the inability, and, to a limited extent, the unwillingness of the common law courts to entertain and give relief in every case, and thus meet all the requirements of justice. The common law courts paid such deference to forms and precedents that they became slaves to them. Their jurisdiction was thus circumscribed. They adhered to certain precise writs and rigid forms of action which were not sufficiently comprehensive to enable them to give adequate redress in some cases of injustice and wrong, or to give any redress in many others. In such cases
7 the aggrieved person was remediless, except he could get a hearing of the king himself. Petitions by those in such case were, therefore, frequently presented to the king, asking for relief of him as matter of grace, because it could not be got of his courts. From the fact that the king usually referred such petitions to his secretary, called his chancellor, they came, in course of time, to be presented to the chancellor directly by the suitors themselves ; and thus, gradually, and at a time which history cannot enable us to precisely fix, the Court of Chancery came to be established. As is seen, its jurisdiction was wholly extraordinary. Relief
8 was afforded by it only in those cases wherein the common law courts either could give no redress at all, or could not give adequate redress ; and anyone coming to chancery with a case which did not need its extraordinary jurisdiction, but could be adequately dealt with in the common law courts, was dismissed for lack of jurisdiction.

Thus, side by side, there existed the Court of Chancery and the common law courts, each with a distinct jurisdiction, the test of chancery's jurisdiction in any given case being that the

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suitor could either get no relief, or could not get adequate relief, in a court of common law. And, therefore, necessarily, there also grew up, not only two distinct systems of practice in these courts, but also two distinct systems of substantive jurisprudence, that in the Court of Chancery being the system which we call equity. In the formation of the government of this State these two distinct kinds of courts and systems were given a place from the beginning, and the Court of Chancery here was clothed with the general jurisdiction and powers of the High Court of Chancery in England. Separate courts thus administered these separate systems of jurisprudence in this State until, by the Constitution of 1846, the Court of Chancery was abolished and its jurisdiction and powers were devolved upon the Supreme Court. From that time on the same court has administered justice under both systems; but, all the same, the two systems have necessarily preserved their identity and continue to exist. The Court of Chancery is gone, but the system of equity jurisprudence remains, and is still administered, but by the same court which also administers the common law system. There is only one court to administer both systems, but they remain distinct systems. 9 10 11

This much have I said because we seem sometimes to lose sight of it and think otherwise. The cause of this is, no doubt, the enactment in our first Civil Procedure Code of 1848, and found in our present revised Code of Civil Procedure, namely: "There is only one form of civil action. The distinctions between actions at law and suits in equity, and the forms of those actions and suits, have been abolished" (§ 3339). But this enactment relates only to the two systems of practice, and has no reference to the two systems of substantive jurisprudence. They still exist side by side, but the separate systems of practice under which they were formerly administered have been abolished, and the one system of our practice statute substituted. It is in this view that our Court of Appeals has said that "the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out" (*Gould v. Cayuga County Nat. Bank*, 86 N. Y., 75, 83); and again, that "the names of actions no longer exist, 12

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13 but we retain, in fact, the action at law and the suit in equity" (Stevens v. The Mayor, etc., of New York, 84 N. Y., 304); and again, that "although the distinction between actions at law and suits in equity is abolished, the distinguishing features between the two classes of remedies, legal and equitable, are as clearly marked and rigidly observed as they ever were, and this is necessary to the administration of justice in an orderly manner and the preservation of the substantial rights of suitors." (Chipman v. Montgomery, 63 N. Y., 221, 230.) In a word, the forms are all that are changed. The two distinct systems of justice still
14 remain, though they are administered by the same court, under one system of practice.

This brings me down to saying what must be done with this action. Under our existing system, both actions at law and suits in equity being brought in the same court, they are in regular course placed upon separate calendars by the parties themselves; namely, actions at law upon the calendar of causes to be tried by a jury, and equity actions upon the calendar of causes to be tried by the court without a jury. When chancery
15 existed as a separate court, if a suitor came there with a common law action he was dismissed for lack of jurisdiction. But now, if a plaintiff place an action at law upon the equity calendar, and notice it for trial there, he may not be dismissed out of court. The court may, of its own motion, refuse to hear it and send it to the jury calendar; or, if the court be willing to hear it, the defendant may, nevertheless, by demanding a jury trial, have the cause sent to the jury calendar; and, if he do not so demand, he waives the right to a jury trial and confers jurisdiction upon the court to hear it without a jury; and the rule is the
16 same whichever side has so placed it upon the calendar and noticed it (Code Civ. Pro., § 1009). The cause of action stated in the complaint in this action being wholly equitable, and in no respect constituting an action at law, the case was properly placed upon the equity calendar and noticed for trial there by the parties. For the same reason, the defendant had no right to demand a jury trial.

The case presented by the complaint was not one which entitled the plaintiff to a jury trial, and he was bound by the

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complaint in that respect. It cannot, therefore, be claimed that 17
 he has waived a trial by jury of the cause of action presented by
 the evidence. Nor can it be said that, by failure to plead in his
 answer that the defendant had an adequate remedy by an action
 at law, he has waived his right to so claim now. When Chan-
 cery existed as a separate court, and a suitor came there asking
 for equitable relief upon a statement of facts in his bill upon
 which he could not get full, complete and adequate relief in an
 action at law, the chancellor was free to so inform him and
 refused to be vexed by his suit; but, in order that the defend-
 ant might so insist and have the suit dismissed on his motion, it 18
 was necessary for him to so plead in his answer, in default of
 which he was held to have waived that defence and submitted
 the cause to chancery for equitable disposition, provided that
 court could in the end make any such disposition of it; and
 such is still the rule of pleading. (*Grandin v. Leroy*, 2 Paige,
 509; *Wiswall v. Hall*, 3 *id.*, 313; *LeRoy v. Platt*, 4 *id.*, 77;
Truscott v. King, 6 N. Y., 147; *Town of Mentz v. Cook*, 108
id., 504; *Ostrander v. Weber*, 114 *id.*, 95; *Watts v. Adler*, 130
id., 646.) But the facts stated in the complaint made the action 19
 at bar an equitable one solely, and not of legal cognizance, and,
 therefore, the defendant could not properly have pleaded that
 the plaintiff had an adequate remedy in an action at law. He
 was not required to plead that upon the actual facts which the
 plaintiff had not pleaded the plaintiff could get adequate redress
 in an action at law. He was only required to plead to the com-
 plaint; and the complaint being framed solely for equitable
 relief, it being found upon trial that the plaintiff is not entitled
 to such relief, the court cannot entertain the action to give 20
 judgment for damages, or to amend the complaint, so as to
 change the action into one at law. (*Wheelock v. Lee*, 74 N. Y.,
 495; *Oakville Co. v. The Double-pointed Tack Co.*, 105 *id.*,
 658; *Bockes v. Lansing*, 74 *id.*, 437.)

The complaint is, therefore, dismissed with costs.

NOTE.—The difference between the two causes of action is well illus-
 trated in the case of *Arnold v. Angell*, 62 N. Y., 508; rev'g 35 Super. Ct.
 (J. & S.), 27.

Upon the facts the parties being in contention whether their relation

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21 was that of partners, or employer and employee,—*Held*, that these were different causes of action although founded on the same facts.

In accordance with this principle it was held in a somewhat similar controversy, that judgment against plaintiff in an action founded on the theory of a partnership would not bar a subsequent action founded on the theory of employment, because the causes of action were different. *Marsh v. Masterton*, 101 N. Y., 401.

Compare *White v. Gaines*, 25 N. Y. Weekly Dig., 361; *Floyd v. Patterson*, 72 Tex., 202.

Coulter v. Bower, 11 Daly, 208.

COULTER v. BOWER.

New York Court of Common Pleas, Special Term, 1882.

[Reported in 11 Daly, 208.]

1. An action to foreclose a mortgage, being an action to enforce a security collateral to the bond, failure to perform the condition of the bond must be alleged in the complaint.
2. A complaint which does not allege such breach is demurrable.

Action to foreclose a mortgage.

1

Defendant demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

VAN BRUNT, J. The complaint in this action is for the foreclosure of a mortgage, and alleges the giving of a bond conditioned for the payment of \$5,450 on the first day of May, 1861, with interest thereon at the rate of seven per cent. per annum, and as collateral security for the payment of such indebtedness, the execution and delivery to the plaintiff of a mortgage upon certain premises in the complaint described, and that the said mortgage contained the same condition as the said bond, and in default of payment of the said sum of money, or the interest that might accrue thereon or any part thereof, the plaintiff was thereby empowered to sell, etc.; that the mortgage was recorded; and that there is now justly due to the plaintiff upon said bond and mortgage the sum of \$5,450, together with interest thereon from the first of May, 1861.

2

The defendant in this action has demurred to said complaint upon the ground, among others, that the complaint does not state facts sufficient to constitute a cause of action.

3

The defect complained of is that there is no allegation of default in the performance of the condition of the bond.

It is urged upon the part of the plaintiff in support of the complaint that if the facts set forth are sufficient for the statement of an indebtedness, the cause of action is complete, and that upon the trial, in order that the plaintiff should make out a case in the first instance, no other proof would be required than the bond and mortgage themselves, and the evidence of their

Coulter v. Bower, 11 Daly, 208.

- 4 execution ; that the plaintiff is not required to allege any more in his complaint than he would be obliged to prove in order to make out a *prima facie* case upon the trial.

5 This proposition is undoubtedly true ; but the fact that without any denial of the execution of the bond and mortgage it would be necessary for the plaintiff to produce the bond and mortgage upon the trial goes to show that the proper allegations are not contained in the complaint. The fact of the possession of the bond and mortgage by the plaintiff has been held to be evidence and proof that there has been a default in the condition of the bond, if the bond upon its face is overdue ; and the failure to produce the bond upon the trial, in the absence of any evidence going to excuse its non-production, has been held to entitle the defendant to judgment because of the failure upon the part of the plaintiff to prove that there has been a default in the performance of the condition of the bond.

6 It might be very true that, if a suit was brought upon the bond alone, an allegation of default would be unnecessary to entitle a party to a recovery where the bond had become due by its terms ; but in an action to foreclose a mortgage, the suit is not upon the bond, but to enforce a collateral, and the collateral can only be enforced in case of the failure to perform the condition of the bond ; and the rule governing pleadings in regard to contracts is, that if the contract is alleged to be broken, the breach must be averred. This is elementary law, and the contract of mortgage between the mortgagor and the mortgagee is only broken on default of the performance of the condition of the bond, and that breach must be alleged in order that the mortgagee may enforce the security which has been given to him to be enforced only upon breach of its condition.

7 I am of the opinion, therefore, that the demurrer is well taken, and that the complaint is fatally defective in not alleging the breach in the condition of the bond.

The plaintiff, however, may have leave to amend, upon payment of costs of the demurrer.

Order accordingly.

NOTE ON PLEADING AND PARTIES IN FORECLOSURE.

I. PLEADING.

The complaint must sufficiently show the execution and delivery of the bond and mortgage, the identity of the mortgaged premises, and such default or breach as entitles the plaintiff to foreclose.

Coulter v. Bower, 11 Daly, 203, *supra*, p. 301.

It must set out all mesne assignments of the mortgage.

An allegation "that the plaintiff is, by several mesne assignments, now the lawful holder and owner of the bond and mortgage above mentioned" is insufficient to show ownership in plaintiff.

Rose v. Meyer, 1 How. Pr. N. S., 274.

A general allegation that the defendants [naming them] "have or claim to have some interest in or lien upon the said mortgaged premises, which interest or lien, if any, has accrued subsequently to the lien of the said mortgage" is a sufficient statement of a cause of action against such defendants—in case such interest is proven to be actually subsequent.

Doury v. Clark, 16 How., 424.

But under such an allegation prior liens are wholly unaffected, even though the holder has been personally served and makes default. If plaintiff joins a prior incumbrancer for the purpose of having the amount of his lien determined and paid, he must so allege; otherwise his action will be deemed to seek the foreclosing of subsequent liens, and the prior lien remains unaffected.

Frost v. Koon, 30 N. Y., 428, 447.

Emigrant Ind. Sav. Bank v. Goldman, 75 *id.*, 127.

Where a prior incumbrancer had been joined under a proper allegation, and the prayer for relief asked that the amount of the prior incumbrance be ascertained and paid out of the first proceeds of sale, and the holder thereof was properly served and made default and the judgment followed the prayer for relief—*Held*, that he was precluded by the judgment and could not maintain a subsequent action for the foreclosure of such prior mortgage.

Jacobie v. Mickle, 144 *id.*, 237.

Where the mortgagor's wife had not joined in the mortgage—*Held* that in the absence of any averment in the complaint that the mortgage was prior, or superior, or hostile, to her right or interest, her inchoate right of dower in the premises was unaffected, notwithstanding the fact that she was made a nominal party defendant and had been personally served and interposed no defense and a regular decree of foreclosure entered.

Merchants Bank v. Thomson, 55 N. Y., 7.

In an action to foreclose a prior unrecorded mortgage in which the holder of a subsequent and recorded mortgage is joined as a defendant, the complaint need contain no special allegations regarding the latter's

Note on Pleading and Parties in Foreclosure.

- 5 status, but a general allegation is sufficient that the latter has or claims to have some lien or interest upon the mortgaged premises which, if any, is subsequent to the lien of plaintiff's mortgage.

Constant v. Amer. Baptist, etc., Soc., 53 Sup. Ct., 170.

The prayer for judgment should specify all the relief to which plaintiff believes himself entitled; a judgment for deficiency cannot be awarded against a defaulting defendant unless demanded in the complaint.

Simonson v. Blake, 20 How. Pr., 484.

If a deficiency judgment is demanded in the complaint, but the judgment, entered after defendant's appearance and default, contains no provisions therefor, the court will not allow an amendment after sale.

U. S. Trust Co. v. Schleip, 31 Abb. N. C., 52.

6

II. PARTIES.

The following is an index of cases on parties in foreclosure; the proper limitations of the volume, however, prevent a presentation of particular facts involved in each case.

General Principle:

As a general proposition, all persons who have or claim an interest in, or lien upon, the mortgaged premises, subsequent or inferior to the lien of the plaintiff's mortgage, are *necessary parties*. If not joined as parties defendants, their interests will remain undistributed, and they will retain the right to redeem after the foreclosure sale.

- 7 Authority to join such holders or claimants of adverse interests is given by §447, C. C. P.

(a.) The following are *necessary parties* [except where otherwise specially noted]:

Plaintiff.

The mortgagee, if he continues to own the mortgage.

Emigrant Indus. Savings Bank v. Goldman, 75 N. Y., 127.

The assignee thereof.

The executors, or *administrators* of deceased mortgagee.

Plaintiff or defendant.

- 8 *Mortgagee who has absolutely assigned is not.*

Haaron v. Lyons, 30 State Rep., 416.

But if the assignment is by way of security, he is.

Bard v. Poole, 12 N. Y., 495.

Bloomer v. Sturges, 58 *id.*, 168.

Pledgee of mortgage.

(But whether made a defendant or joined by the owner of the mortgage as a co-plaintiff is immaterial).

Simson v. Satterlee, 64 N. Y., 657; aff'g 6 Hun, 305.

Defendant.

Present owner of equity of redemption.

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Prior owners, even the original mortgagor, are not.

Daly v. Burchell, 18 Abb. Pr. N. S., 264.

Walton v. James, 11 Weekly Dig., 508.

Unless some interest in the equity of redemption still remains, as a right to redeem after a sale under execution.

Hallock v. Smith, 4 Johns. Ch., 649.

Wife of owner of equity of redemption, since she has dower right.

Merchants Bank v. Thomson, 55 N. Y., 7.

Even in action to foreclose a purchase money mortgage, wife has an inchoate right of dower in equity of redemption which is not cut off unless she is made a party defendant.

Mills v. Van Voorhies, 20 N. Y., 412.

Wife of prior owner of equity of redemption, who did not unite in deed 10 with husband.

People v. Knickerbocker Life Ins. Co., 66 How. Pr., 115.

Owner of an estate by the curtesy.

Hecker v. Sexton, 6 State Rep., 680.

Assignee in Bankruptcy of Mortgagor.

Winslow v. Clark, 47 N. Y., 261.

(But not if subsequent to filing of *lis pendens*.)

Daly v. Burchell, 18 Abb. Pr. N. S., 264.

General Assignee.

Julien v. Lalor, 47 Hun, 164.

(Even after settlement of his account under a decree providing that he 11 is discharged on compliance with its terms, but such terms not having been complied with.)

Temporary receiver of corporation is not, although appointed in an action by people to dissolve, which action is pending in same court.

Herring v. Erie R. Co., 105 N. Y., 340.

Devisees of the mortgaged premises.

Devisees of a subsequent mortgagee are not, although the executors have brought foreclosure on the 2d mortgage and purchased at the sale.

Lockman v. Reilly, 95 N. Y., 64.

Executors of a subsequent mortgagee.

Lockman v. Reilly, 95 N. Y., 64.

Legatees of the owner of the equity, where legacies are made charge on 12 land.

McGown v. Yerks, 6 John Ch., 450.

Remainder-men who may enforce a conveyance as a valid power in trust, though the trust itself is void as a trust.

Graham v. Fountain, 2 N. Y. Supp., 598. (Deed to trustee for benefit of another for life and in trust to convey to surviving children of *cestui que trust*.)

Infant remainder-men, notwithstanding life estates are outstanding, and life tenants are joined.

Leggett v. Mut. Life Ins. Co., 64 Barb., 23.

Note on Pleading and Parties in Foreclosure.

- 13 *Beneficiaries* are *not*, when claiming under a direction to executors to sell and invest proceeds, and pay over income to.

Mut. Life Ins. Co. v. Woods, 4 N. Y. Supp., 133.

Heirs at law of deceased mortgagor or owner of equity.

Woods v. Moorehouse, 1 Lans., 405.

So, under agreement to hold land as security for advances, with power to sell and account for surplus, which the court held to constitute an equitable mortgage.

Dodd v. Neilson, 90 N. Y., 243.

So, although testator has given full power of sale to executors and disposed of the proceeds arising from such sale.

- 14 Noonan v. Brenneman, 54 Super. Ct., 337; (*contra*) Graham v. Livingston, 7 Hun, 11.

Executors of deceased mortgagor, under devise to them in trust.

So, under direction or power to sell.

Noonan v. Brenneman, 54 Super. Ct., 337.

Person named as one of two executors, but who does not qualify or act, where other qualifies and is joined, is *not necessary*.

Steinhardt v. Cunningham, 55 Hun, 375.

Trustees who hold the equity must *all* be made parties.

Paton v. Murray, 6 Paige, 474, but see Steinhardt v. Cunningham, *supra*.

- 15 *Cestui que trust* is, when he is entitled to some direct equitable estate or interest in the land as land.

Lockman v. Reilly, 95 N. Y., 65, and cases cited.

——— is *not*, where on foreclosure of junior mortgage the executor has bought in at sale.

Id.

——— is *not*, in an action to foreclose mortgage given by the trustee.

Harlem, etc., Assoc. v. Quinn, 32 State Rep., 909.

Stockholder of corporation mortgagor is *not*.

Smith v. Moquette Loom Co., 20 Weekly Dig., 342.

Trustee, in an action by bondholders, after trustee's refusal to sue.

Davies v. N. Y. Concert Co., 41 Hun, 492.

- 16 *Contingent Interests.*

Mortgagor's widow holding life estate and children living at commencement of action, are all the necessary parties under devise of remainder to children and upon death of child to its offspring.

Echmann v. Alt, 4 Misc., 305.

As a general rule, it is not necessary to make every claimant of such interests a party in order to bar his claim; but if that person who has the first vested estate of inheritance, and who is *in esse*, is before the court the judgment appears to be a bar both to his right and to the right of a contingent remainder-man not a party.

Brevoort v. Brevoort, 70 N. Y., 136.

Thomas on Mortgages, § 734.

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Purchaser of growing trees is *not*—where purchase made under execution sale, and mortgagee had no notice. 17

Batterman v. Albright, 122 N. Y., 484.

All *purchasers* on first foreclosure *are*, in a second action to foreclose, brought against a junior mortgagee who was omitted in first action.

Moulton v. Cornish, 30 Abb. N. C., 329.

Transferees after filing of *lis pendens* are *not*.

Wagner v. Hodge, 34 Hun, 524.

(Assignee in bankruptcy).

Where deed, though prior, is not recorded till after filing of *lis pendens*, and mortgagee had no notice.

Kindberg v. Freeman, 39 Hun, 466.

Grantee under ineffectual deed is *not*. 18

Bram v. Bram, 34 Hun, 487.

(Attempted deed by wife alone of $\frac{1}{2}$ of premises held by the entirety.)
A city which has acquired part of mortgaged premises for public use, is *not*.

Hooker v. Martin, 10 Hun, 302.

Junior mortgagees, where such mortgages have been recorded.

Benjamin v. Elmira, etc., R. Co., 54 N. Y., 675.

So, even if not indexed.

Mut. Life Ins. Co. v. Dake, 1 Abb. N. C., 381.

But *not* if unrecorded, although an assignment to the present owners has been recorded. 19

Kipp v. Brandt, 49 How., 358.

———, their *personal representatives*, if deceased.

German Savings Bank v. Muller, 10 Weekly Dig., 67.

———, their *heirs* are *not*.

Id.

Lessee, under recorded lease.

Tenant in possession under subsequent letting.

Hirsch v. Livingston, 3 Hun, 9.

Judgment creditors who have existent liens.

Reynolds v. Park, 53 N. Y., 86.

The rule is the same although it be a purchase money mortgage.

Winebrener v. Johnson, 7 Abb. Pr. N. S., 202. 20

The lien of a judgment on lands of judgment debtor in county where docketed continues for ten years after filing of the judgment roll and attaches to property then owned or subsequently acquired within the ten years.

C. C. P., § 1251.

If judgment debtor dies during the existence of the lien, it is continued for three years and six months after the issuance of letters upon his estate, notwithstanding the expiration of ten years from filing of judgment roll.

Re Matteson, 50 State Rep., 275.

C. C. P., § 1380.

Note on Pleading and Parties in Foreclosure.

- 21 The lien of a justice's judgment, when duly docketed with the county clerk, is a lien on the real estate of the judgment debtor for ten years.
 C. C. P., § 3017.
Re Matteson, 50 State Rep., 275; s. c. 21 N. Y. Supp., 576.
Waltermire v. Westover, 14 N. Y., 16.
Townsend v. Tolhurst, 32 State Rep., 21.
 But the amount of the judgment must exceed \$25 exclusive of costs.
 C. C. P., § 3017.
 A judgment entered against a party after his death, under § 763 C. C. P., is not a lien on decedent's real property.
 C. C. P., § 1210.
Re Clark, 15 Abb., 227.
- 22 *Creditors by simple contract are not.*
Herring v. Erie R. Co., 105 N. Y., 340.
Unknown defendants. If any party or parties having an interest in or a lien on the mortgaged premises are unknown to plaintiff, and the residence of such parties cannot, with reasonable diligence, be ascertained by him, an order may be granted for service by publication and the parties be designated by fictitious names with a description added, identifying the person intended.
 C. C. P., §§ 451, 438.
 Such service is valid and binding, although it appears that the unknown party is an infant.
Wheeler v. Scully, 50 N. Y., 667.
- 23 When unknown owners are made defendants under §§ 438, 451 C. C. P., and are described in the summons, the addition of the words "if any" does not invalidate the process.
Abbott v. Curran, 98 N. Y., 665.
 The affidavit upon which the order may be granted must show that the names or residences are unknown to the *plaintiff*; an affidavit by plaintiff's attorney that "deponent does not know" and which states no reason why the affidavit is not made by plaintiff, is insufficient.
Piser v. Lockwood, 30 Hun, 6.

(b) Proper Parties :

- 24 Proper parties, as distinguished from necessary parties, are those without whose presence before the court, it will proceed in the action and render judgment of foreclosure and sale, but if joined as defendants the court may decree some further or special relief, or settle some controverted question, which could not be effectually done in their absence.
 A proper party may be joined by the plaintiff, or upon his own application, may be allowed to intervene.
 In general a claimant under a prior right cannot be joined for the purpose of attacking the validity of such prior right, but (as for instance, in the case of a prior mortgagee) may properly be joined for the purpose of having the amount of the incumbrance determined, and either paid out of

Note on Pleading and Parties in Foreclosure.

proceeds of sale or decreed to remain a lien on the property in hands of 25
purchaser.

The following will illustrate who are, or are not, proper parties within
the above principles :

The mortgagee, in an action by his assignee, is a proper party.

Hoyt v. Martense, 16 N. Y., 231.

A mortgagor who has conveyed absolutely, is.

Daly v. Burschell, 13 Abb. N. S., 264.

Owner of equity, under unrecorded deed, *is properly joined* on his
application.

Johnston v. Donvan, 106 N. Y., 269.

Prospective grantee. Knowledge of owner's intent to convey does not
justify plaintiff in joining the prospective grantee. 26

Hattfield v. Malcolm, 71 Hun, 51.

General assignee is.

Julien v. Lator, 47 Hun, 164.

Assignee in bankruptcy is, whose right is subordinate to plaintiff's.

Ostrander v. Hart, 30 State Rep., 170.

The representative character must plainly appear.

Landon v. Townshend, 129 N. Y., 166.

Guarantor of payment, is.

Griffiths v. Robertson, 15 Hun, 344.

So, of collection.

Vanderbilt v. Schreyer, 16 Weekly Dig., 464,

and under C. C. P., § 1637; but judgment will provide that no execution 27
issue against him until the return, unsatisfied, of an execution against the
parties primarily liable.

Leonard v. Morris, 9 Paige, 90.

So, of payment of railroad bonds on his own application for purpose of
showing foreclosure unnecessary.

Merc. Trust Co. v. Rochester, etc., R. Co., 2 Weekly Dig., 518.

Successors of deceased mortgagor, personally liable, are.

(Including legatees, devisees, heirs or next of kin, for purpose of charg-
ing them on statutory liability for assets received.)

Re Collins' Petition, 6 Abb. N. C., 227.

Stockholders are *not*, unless on their application to intervene they show
a defence. 28

Smith v. Moquette Loom Co., 20 Weekly Dig., 342.

Cestuis que trust are, in foreclosure of trustee's mortgage.

Harlem, etc., Assoc. v. Quinn, 32 State Rep., 909.

Prior mortgagees are, so as to have amount of such prior lien deter-
mined by judgment.

Met. Trust Co. v. Tonawanda R. Co., 18 Abb. N. C., 368.

Guilford v. Jacobie, 69 Hun, 420.

But the particular relief sought must be clearly stated in the complaint
or the prior lien will be unaffected.

Emigrants Bank v. Goldham, 75 N. Y., 127.

 Note on Pleading and Parties in Foreclosure.

- 29 Demurrer for insufficiency overruled in
 Smith v. Davies, 4 Civ. Pro. R., 158.
 Pendency of the action is no defence to a subsequent action by the defendant on his prior mortgage.
 Adams v. McPartlin, 11 Abb. N. C., 369.
 But a judgment is a bar, where the defendant defaulted, and the amount of his prior mortgage was determined by the judgment and ordered paid out of the first proceeds of sale, in accordance with the prayer of the complaint.
 Jacobie v. Mickle, 144 N. Y., 237.
 Claimants under prior rights other than mortgages, are not,
 For purpose of trying validity of their claims.
- 30 Kent v. Popham, 6 Civ. Pro. R., 366.
 nor should they be allowed to intervene, if their rights cannot be prejudiced.
 Merc. Trust Co. v. Rochester, etc., R. Co., 22 Weekly Dig., 65.
 But a claimant under a tax sale held a proper party where it appeared that statutory notice to the mortgagee was not given and the court held that the tax purchaser's claim was subordinate.
 Ruyter v. Wickes, 4 N. Y. Supp., 743.
 So, a prior mechanic's lienor may be properly joined to have amount of lien determined and paid.
 Emigrants Savings Bank v. Goldham, 75 N. Y., 123.
 Purchaser at tax sale is.
- 31 Roosevelt Hospital v. Dowley, 57 How., 489.
 Creditors by simple contract are not, although they claim the mortgage is fraudulent and the foreclosure collusive.
 Gardner v. Lansing, 28 Hun, 413.
 Nor have they any right to be joined on application.
 Herring v. Erie R. Co., 105 N. Y., 340.
 The vendee under executory contract of sale, is.
 Crooke v. O'Higgins, 14 How., 154.

Townsend v. Bogert, 126 N. Y., 370.

TOWNSEND v. BOGERT.

New York Court of Appeals.

[Reported in 126 N. Y., 370; rev'g. 35 State Rep., 76.]

1. In an action between tenants in common, for partition of real property by sale and division of proceeds, it is proper to join as defendants third persons who claim some right which is a cloud on the title. This is not a separate cause of action, but they are properly joined by reason of their making claim to the premises.
2. A general allegation that such defendants "claim some right, title or interest in said premises, the exact nature of which is unknown to plaintiff, and which is a cloud on the title to the premises" is sufficient if the necessity of a sale be also shown.
3. If their claim is such as to be unaffected by the partition, this defence should be pleaded by them by answer.
4. The rules of pleading in equity are broader and more elastic than those at law, by reason of the inherent character of the relief which may be allowed.
5. In carrying out the general rule of equity that all persons materially interested in the subject of a suit are to be joined, a plaintiff who is ignorant of the nature, extent or merits of an adverse claim may join the claimant, and require him to set forth his claim if he chooses to assert it in the action.

Action for partition.

1

The allegations of the complaint were as follows:

I. That he, plaintiff, together with the defendants Josiah Lockwood and Mary N. Townsend, are seized and possessed in fee as tenants in common of all those four lots of land in said city of New York which, taken together, are abutted and bounded as follows: [*Description of premises.*]

II. That the plaintiff is seized and possessed in fee of four undivided tenth parts of said premises; the defendant Josiah Lockwood is seized and possessed in fee of an undivided tenth part of said premises, and the defendant Mary N. Townsend is seized and possessed in fee of five undivided tenth parts of said premises, and has an inchoate right of dower in an undivided half part of said premises.

2

III. That the defendant Caroline Lockwood, as the wife of

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- 3 said Josiah Lockwood, has a contingent right of dower in one undivided tenth part of said premises.

IV. That the defendants, the mayor, aldermen and commonalty of the city of New York, and the defendant Artemus S. Cady, as clerk of arrears and collector of assessments in said city, claim that said premises are subject to liens for arrears of assessments, taxes and Croton water rents and for sales therefor, and such claim is a cloud upon the title to said premises.

- 4 V. That defendants Ellen J. Huntington, Carlos C. Huntington, Isaac Jessup and Emma F. Jessup, his wife; Caroline A. Bogert, Stephen G. Bogert, Ann Augusta Linsly, John H. Linsly, Elida Jessup, Edna Jessup, Isaac E. Jessup, all individually, and the said Stephen G. Bogert and John H. Linsly, as executors of the last will of Isaac K. Jessup, deceased, claim some right, title or interest in said premises, the exact nature of which is unknown to plaintiff, and which is a cloud upon the title to said premises.

- 5 VI. That said premises are so situate that division or partition thereof among the parties entitled thereto according to their respective rights and interests cannot be had without great prejudice to the owners thereof.

VII. That except the defendant, Isaac E. Jessup, all the parties to said action are of full age. The lands herein described are the only lands owned in common by the parties to this action.

VIII. No personal claim is made against any defendant.

- 6 Plaintiff demands judgment as follows:

I. That the plaintiff is seized and possessed in fee, subject to the contingent right of dower to Mary N. Townsend therein, of four undivided tenth parts of said premises as tenants in common with defendants Josiah Lockwood and Mary N. Townsend as co-tenants.

II. That the defendant Josiah Lockwood is seized and possessed in fee, subject to the contingent right of dower of Caroline M. Lockwood and Mary N. Townsend therein, of one

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undivided tenth part of said premises, as tenants in common 7
with plaintiff and the defendant Mary N. Townsend, as co-
tenants.

III. That the defendants Mary N. Townsend is seized and
possessed in fee of five undivided tenth parts of said premises as
tenant in common with the plaintiff and the defendant Josiah
Lockwood, as co-tenants.

IV. That the defendants Ellen J. Huntington, Carlos C.
Huntington, Isaac Jessup and Emma F. Jessup, his wife;
Caroline A. Bogert, Stephen G. Bogert, Ann Augusta Linsly, 8
John H. Linsly, Elida Jessup, Edna Jessup and Isaac E. Jessup,
all individually, and the said Stephen G. Bogert and John H.
Linsly as executors of the last will of Isaac K. Jessup, deceased,
and the mayor, aldermen and commonalty of the city of New
York, and Artemus S. Cady, as clerk of arrears and collector
of assessments in the finance bureau of said city, have not,
nor has any or either of them, individually or collectively, or
officially or as executors, any right, title or interest, claim or
demand, of, or to, or in, or upon, or against said premises or any
part thereof. 9

V. That said premises are so situate that a sale thereof is
necessary, and that said premises be sold by and under the
direction of the court and conveyance given to the purchasers.

VI. That out of the moneys arising from said sale the
plaintiff be paid his costs of this action and of said sale.

VII. That out of the residue of the moneys arising from said
sale there be paid to Caroline M. Lockwood and Mary N.
Townsend, if they will receive the same, the value of their
respective contingent rights or dower in said premises upon 10
their executing releases of said dower rights.

VIII. That the residue of said moneys arising from said sale
be divided and paid four-tenths thereof to the plaintiff, and one-
tenth thereof to the defendant, Josiah Lockwood, and five-tenths
thereof to defendant, Mary N. Townsend.

IX. That it be adjudged that by said sale and conveyance,
pursuant thereto, the plaintiff and defendants and all persons
claiming through or under them, subsequent to the filing of

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- 11 notice of the pendency of this action, be barred of all right, title and interest in said premises in possession, reversion, remainder or otherwise.

Defendants demurred on the ground (1) that the complaint did not state facts sufficient to constitute a cause of action; (2) that there was an improper joinder of causes not affecting all defendants.

- 12 *The Superior Court at Special Term* (FREEDMAN, J.) overruled the demurrer "under the provisions of the Code of Civil Procedure applicable to this action."

The General Term reversed the decision of the Special Term, and sustained the demurrer, on the ground that, under the provisions of the Code, only such persons are proper parties who either have an estate in the premises, or some portion thereof, or who have a lien or interest attaching to the entire property, or to an undivided share or interest therein; and each defendant's share or interest must appear from the complaint.

- 13 *The Court of Appeals* reversed the judgment of the General Term.

- FINCH, J., We are of opinion that the General Term erroneously sustained the demurrer interposed to the plaintiff's complaint. That pleading, it is conceded, stated a good cause of action for a partition as against the defendants, who held undivided interests in the land as tenants in common, and none of whom object to its sufficiency. It avers that the property is of such character and so situated as to make an actual partition impossible, except with grave injury to the interests of the owners, and, therefore, seeks a sale and division of the proceeds.
- 14 With that relief in view, it further alleges that other parties, naming them, and being those who now demur, "claim some right, title or interest in said premises, the exact nature of which is unknown to the plaintiff, and which is a cloud upon the title to said premises," and asks that they be adjudged to have no interests in the property.

The demurrants interpose two objections: one, that the complaint states no cause of action against them, and the other, that

a cause of action to determine a claim against real estate is 15 improperly united with it in one partition. The demurrants themselves demonstrate that there is no force in the second objection, for they show satisfactorily that none of the conditions made necessary by the Code for the maintenance of such an action have been heeded, and that neither such cause of action nor one to remove a cloud has been stated in the complaint. We agree with them that neither in purpose nor result were any such causes of action pleaded, and that the complaint states alone a cause of action in partition.

The question, therefore, is whether, upon the allegations of 16 the complaint, the right to a partition of the property can be said to affect the defendants who demur. It seems to me that it can. *Prima facie*, and in the absence of a contrary explanation, all persons who either are or claim to be interested in the premises are affected by a demand for a sale and a division of the proceeds, and the cause of action pleaded affects or concerns them, and so becomes a good cause of action for a partition as against them. That the complaint does not show what their interest is, the plaintiff excuses by his ignorance of the nature 17 of their claim; and that is a fault which the defendants can easily repair. That the claim of an interest in the premises may be false or pretended or unfounded, we are not to presume in order to sustain the demurrer. It is true that the interest claimed may prove to be of such a character as to be totally unaffected by the partition sought. If that be so, it should be asserted by answer. The presumption raised by the allegations of the complaint is to the contrary; for they are that the claim is of an interest or right in the property to be sold, and such that it serves to cloud the title. Presumably, that it is a claim of right 18 which the partition will affect, and the parties which have made such claim, and by the demurrer admit that they have, must be assumed to have done so in good faith, and not falsely or fraudulently.

The rules of pleading in equity, while the same in form with those in actions at law, are, nevertheless, broader and more elastic by reason of the inherent character of the relief which may be sought and given. It has always been held as a general

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19 rule in equity, that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree which shall bind them all. (*Caldwell v. Taggart*, 4 Peters, 190.) In carrying out that rule it sometimes happens that a plaintiff knows the fact that a third person claims an interest in the subject-matter of the action, but does not know the nature, extent or merits of the claim, which cannot, nevertheless, be entirely ignored without peril to the completeness of the remedy sought. In such an emergency the facts may be stated, the claimant be called in as a party, and required to disclose his alleged interest. While bills of discovery are abolished, yet in such a case as we have described a discovery of the defendant's claim is incidental to the relief sought and essential to its completeness. Indeed, it has been said that every bill for relief is in reality a bill of discovery, since it asks from the defendant an answer as to all the matters charged in the bill. (*Story's Eq. Pleading*, § 311.) The Revised Statutes acted upon these principles in framing the specific rules applicable to actions of partition. (2 R. S., part 3, chap. 5, tit. 3, § 5.) The petition was required to set forth the rights and titles of all persons interested, "so far as the same are known to the petitioner," and the rule to appear and answer required the defendants interested, whether their interest was known or unknown, "to show title to the proportions which they may claim" in the premises. (§ 13.) While the Code has changed the forms of pleading it has not destroyed their essential characteristics except in some minor degree. In providing for actions of partition, section 1542 was ostensibly founded upon section 5 of the Revised Statutes, and like that section requires the rights of the parties to be stated "so far as they are known to the plaintiffs." So far as they are not known such interest can only be described as "a claim," for it will not do to say that the plaintiff must admit the validity of an asserted interest the nature of which he does not know.

22 This complaint, therefore, alleged all that it could to show why the demurrants were made parties, and how the cause of action concerned them. The relief of a sale could only be complete and effective by the ability to give a clear title.

(Bogardus v. Parker, 7 How. Pr., 305.) That result could only 23
be reached by bringing the claimants into court and calling
upon them to disclose their interest or disclaim its existence,
and so the allegations of the complaint were sufficient *prima*
facie to extend the one cause of action to the demurrants and
bring them within its influence. They are either so situated as
to be affected by the decree or not affected by it. Presumably,
from the averments of the complaint they will be affected by it.
If, however, they insist that their interest may be of such a
character that it will not be affected by a possible sale of the 24
property, or that it cannot or ought not to be tried in the suit, it
is enough to say that the plaintiff cannot negative in his
complaint a character of their claim of which he asserts his
ignorance.

If either of those conditions exist the remedy is not by a
demurrer. If the actual partition or sale will not affect or
disturb the rights of the party, he may safely disregard the
action entirely, since no personal judgment is sought against
anybody; or he may answer showing that his presence is
unessential and ask to have the complaint dismissed as to him. 25
If his interest is of a nature not subject to a trial in the
partition suit he may plead the facts in his answer and again
seek a dismissal of the complaint as against himself. And so
his rights may be perfectly preserved without leaving the
plaintiff to blunder in the dark to an imperfect remedy.

It may be that the complaint asks some relief which cannot
be granted, but that does not make the complaint demurrable.

The judgment of the General Term should be reversed, and
that of the Special Term affirmed, with leave to the defendants 26
to answer upon payment of costs from the interposition of the
demurrer and within twenty days after notice of the entry of
this judgment upon filing the remittitur.

All the judges concurred.

Judgment accordingly.

 Note on Parties in Partition.

 NOTE ON WHO MAY BRING PARTITION, AND WHO
MAY BE MADE PARTIES DEFENDANT.

- 1 *The statutory modifications* of the remedy by action for partition, have nearly all been in the direction of increasing the classes of parties who may bring such a suit, and the classes of persons who may be made defendants.

The present state of the law will be most clearly understood by noting successively the usual condition of estates in respect to which the question arises, and who are proper plaintiffs in each situation.

For important illustrations of the way in which, under these rules, nearly all the equities affecting the property may be worked out and adjusted, see Note on Special Clauses in Judgment in Partition, in 20 Abb. N. C., 102.

- 2 *Jurisdiction.* It is to be observed that the following rules as to who may bring partition are not necessarily jurisdictional. They go to the sufficiency of plaintiff's cause of action, or the misjoinder of plaintiffs, not necessarily to the jurisdiction of the court. (*Cromwell v. Hull*, 97 N. Y., 209; *Reed v. Reed*, 107 N. Y., 545; *Masten v. Olcott*, 101 N. Y., 152.)

And if the plaintiff is one who would be a proper party, and the court has jurisdiction of the subject and the necessary parties have all been joined, and no appeal is taken, the partition will give good title. (*Reed v. Reed*, 107 N. Y., 545.)

- 3 The plaintiff must be in *possession* at least constructively, by holding the legal title (*Wainman v. Hampton*, 110 N. Y., 429), unless he and his co-tenants are remainder-men and reversioners, or where he claims as one of several heirs whose common ancestor died in possession and he seeks to impeach that ancestor's alleged devise. Under the New York Statute, as now in some other States, *title may be tried in partition* by virtue of the statute (Code Civ. Pro. § 1543) allowing the title or interest of plaintiff, and of any defendant stated in the complaint to be controverted, and of any defendant as stated in his answer to be controverted by any other defendant's answer.

Plaintiffs.

- 4 Case 1. *Intestacy of parent.* Where a sole surviving parent dies leaving heirs who take as tenants in common, any heir may maintain partition against the others. (Code Civ. Pro. § 1532.) If, however, in this or any other class of cases plaintiff be an infant, leave of the surrogate must be first had (§ 1534); and the fact that the infant has a general guardian does not entitle the guardian to sue, (§§ 468, 1686); but a guardian *ad litem* must be appointed only by the court (§ 1535), and must give security (§ 1536); but the infant is to be named as the plaintiff, describing him or her as suing by the guardian *ad litem* named. (See *Spooner v. Del., Lack. & W. R. Co.*, 115 N. Y., 22.)

Case 2. *Devise to tenant in common or joint tenants.* The like right to

Note on Parties in Partition.

bring partition is in devisees or grantees to whom property has been given as tenants in common, or share and share alike, and to devisees or grantees to whom it has been given in their own right in joint tenancy. (*Baldwin v. Baldwin*, 74 Hun, 415.) 5

Case 3. *Tenants by the entirety.* Husband and wife, taking as such, that is to say as tenants by the entirety, are not within the statute, unless the words "joint tenants" in §§ 1532 and 1533 may be deemed in a general sense to include such a tenancy. Strictly those words do not. (*Stelz v. Schreck*, 128 N. Y., 263; *PECKHAM, J.*, saying: "It is not a joint tenancy in substance or form.") But they are within the equity of the statute; and since husband and wife may now make partition by deed (L. 1880, p. 676, c. 472), there seems to be no reason why a court of equity should not take jurisdiction where it is equitable to decree partition between them; for partition in equity is founded upon the reasonableness of requiring the parties to release to each other by deed, and compelling them to do so when they unreasonably refuse. 6

Case 4. *Intestacy of husband and father.* Where a husband and father dies intestate, a child may bring partition before the widow's dower has been admeasured (§ 1553), in which case, if actual partition is decreed, the one-third will be set off to the widow as if admeasured in the ordinary way (§ 1553), and the shares of the remainder-men in that third may be allotted among them, subject to her tenancy for life (§ 1553). If sale is decreed, the court must determine whether the third shall be sold free of her claim, or reserved till the termination of her life estate (§ 1567).

If dower has been assigned before partition, a child may still bring partition, joining the tenant in dower (§ 1535) and with the same result. If, in either case, sale is decreed, the widow may have one-third the proceeds invested for her for life (§ 1568), or may accept a gross sum in lieu (§ 1569). 7

Case 5. *Devise to widow for life and remainder to children in fee.* In this case the widow is entitled to possession; but either of the children can maintain partition against the others, joining the widow if he please (§ 1539), and the decree will be subject to her rights, unless she consents to a sale (§ 1533), and the court deem it best that her interest be sold (§ 1567), in which case she may have one-third of the proceeds invested for her life (§ 1568), or have her life estate valued, and a gross sum paid her absolutely (§ 1569).

The fact that a share in remainder is liable to be divested by death before the termination of the life estate, though it may be a good reason for not making actual partition, does not deprive the court of jurisdiction; and if no objection on that account be raised, a purchaser at sale gets good title. 8

Case 6. *Devise in trust for life of widow, remainder to children.* If a valid express trust is created, the beneficiaries of the trust while it endures have not, merely as such, any estate in the lands, and as beneficiaries cannot have partition. Any of the remainder-men can bring partition against the others; and the decree will be subject to the right of the trustees (§ 1533), unless the trustees consent to a sale, which, of course,

Note on Parties in Partition.

- 9 they will not do except under sanction and approval of the court for reasons advantageous (or at least under circumstances making it not prejudicial) to the trust estate.

But if the trustees have an absolute power to sell, especially if they can distribute proceeds in lieu of land, this may or may not be a reason for refusing to make partition. (Compare *Mellen v. Banning*, 72 Hun, 176, and *cas. cit.*)

- Case 7. *Single life tenant and single tenant in remainder.* Here is no situation for actual partition, and neither tenant can require sale. But if either the life tenant or the remainder-man transfers his or her estate to two or more other persons, then such transferees are co-tenants and may have partition against each other; and, in a suit by transferees of the remainder, the life tenant or tenants may consent to a sale.
- 10

Case 8. *Contest between heirs and devisees.* If the heirs of a testator who died in possession desire to contest a devise made by him, they may, although not themselves in possession, bring partition among themselves, joining also the devisees, and impeaching the validity of the devise. A transferee of such a devisee may be also joined. In such an action, establishing the validity of the devise precludes partition; establishing its invalidity allows a decree against the devisee's claim and a partition between the heirs.

For notes of cases, see 28 Abb. N. C., 123.

Defendants.

- 11 Many classes of persons are proper defendants who could not be plaintiffs.

Owners of shares. "Every person having an *undivided share*, in possession or otherwise, in the property, as tenant in fee for life by the courtesy, or for years" must be a party. Code Civ. Pro., § 1538.

Life estates and terms. "A tenant in dower, by the courtesy, for life or for years of the *entire* property," may be a party, at plaintiff's election, § 1539, and if not, is not affected by the judgment.

Right of dower. "Every person having a right of dower in the property or any part thereof, *which has not been admeasured*," must be a party, § 1538.

- 12 *Inchoate right.* Before 1890 the Code contained as to *inchoate right* of dower, this clause: "Every person having an *inchoate* right of dower in an *undivided share* in the property" must be a party, § 1538. But this clause was omitted by the amendment of 1890, p. 914, c. 509. Its omission does not seem to deprive the wife of her protection, and it is difficult to see why it should preclude the plaintiff from joining her, for other sections providing for that are left unimpaired, §§ 1570, 1571.

Remainders, etc. Every person entitled to the *reversion, remainder or inheritance of an undivided share* after the determination of a particular estate therein must be a party," § 1538, and *Schween v. Greenberg*, Hun, 854; *Duffy v. Durant, etc., Co.*, 78 *id.*, 314; *Campbell v. Stokes*, 142 N. Y., 23.

Note on Parties in Partition.

Contingent interests. "Every person who by any contingency contained in a devise, grant or otherwise, is or *may become entitled* to a beneficial interest in an undivided share thereof" must be a party, § 1538. See notes in 26 Abb. N. C., 407; 18 *id.*, 297. 13

Executor, etc., and creditor of necessary party. "The executors or administrators and creditors of a deceased person who, if living, should be a party," must be parties and the premises may be sold free from his debts. § 1538 as amended in 1890.

If upon the death of one of two or more plaintiffs, or one of two or more defendants pending the action, his interest passed to a third person, the latter may be brought in, § 1538.

Creditors. A creditor or other person having a *lien or interest* which attaches to the *entire property* may be a party, at plaintiff's election, § 14 1539, and if not is not affected by the judgment.

A creditor having a lien on an *undivided share* or interest may be made a party at plaintiff's election, § 1540, unless the owner of that share is deceased, in which case the creditor must be made a party.

Kain v. Larkin, 141 N. Y., 144.

KAIN v. LARKIN.

New York Court of Appeals, January, 1894.

[Reported in 141 N. Y., 144; rev'g 66 Hun, 209, and expl'g 181 N. Y., 300.]

1. Where, upon the trial of the action, the court, without taking any proof, dismissed the complaint upon the ground that it did not state sufficient facts to constitute a cause of action, an appeal presents the single question whether, in law, the complaint was sufficient as a pleading to give the plaintiff a standing before the court sufficient to enable him to make out his case by any proof he could.
 2. In such a case, it is sufficiently favorable to the defendants to consider the complaint as before the appellate court upon a general demurrer on the ground of insufficiency.
 3. A demurrer for insufficiency cannot be sustained by showing that facts are imperfectly or informally alleged, or that the pleading lacks definiteness and precision, or that material facts are only argumentatively averred.
 4. The complaint in a judgment creditor's action *held*, erroneously dismissed, at the opening of the trial, where it alleged in substance: the rendering of a judgment for plaintiff against one defendant, return of execution thereon unsatisfied, that the judgment is still unpaid, that, after the cause of action accrued, such defendant transferred the property which would be subject to the lien of the judgment to certain co-defendant relatives without consideration, and with intent to hinder, delay and defraud the plaintiff of his claim.
- 1 Judgment creditor's suit to set aside transfers by the debtor of his property, and to secure satisfaction of an unpaid judgment.

The complaint, after alleging plaintiff's appointment as administratrix of one David Kain, deceased, proceeded:

- II. That the plaintiff herein in her said representative capacity, in an action in the Supreme Court in Ulster County, duly recovered a judgment in her favor against the defendant, Patrick Larkin, for the sum of \$1,518.28, for recovery and costs, less \$20, deducted on retaxation of costs, and the judgment roll thereof was duly filed, and the judgment entered and docketed in said Ulster County Clerk's office on the 16th day of October, 1890; that on the 22d day of November, 1890, an execution on said judgment was duly issued and delivered to the sheriff of
- 2

the county of Ulster, where the said Patrick Larkin then resided 3
and yet resides, and that the said sheriff has duly returned said
execution wholly unsatisfied, and that said judgment remains
wholly unpaid.

III. That the claim and cause of action in said judgment
accrued, and the said defendant, Patrick Larkin, became liable
therefore to the plaintiff on or about November 21st, 1886.

IV. That the said Patrick Larkin at the time said cause
of action accrued, and up to the time of the commencement of
said action, which was commenced on the 6th day of January, 4
1887, by the service on him of the summons and complaint, was
the owner, seized in fee simple, and possessed of real estate of
the value of about \$3,000, besides other personal property and
money in the sum of \$1,404.21, deposited in the Ulster County
Savings Institution.

V. That after the commencement of said action the said
Patrick Larkin disposed of his said property as follows, viz.: On
the 8th day of January, 1887, he drew out from the said Sav-
ings Institution the whole of his money and redeposited \$1,200 5
thereof into the same Savings Institution in the name of Mary
Larkin, his wife, then living, who has since died; that on or
about January 12th, 1887, said Patrick Larkin executed and
acknowledged a mortgage dated back to January 1st, 1887, for
the sum of \$3,000, given upon said real estate to his brother,
Michael Larkin; that, on or about May 1st, 1889, during the
pendency of said action, the said Patrick Larkin executed and
delivered a quit claim deed of said real estate to his daughter,
Maria E. Larkin, a minor, then under the age of twenty-one 6
years, the defendant herein, who resided with him, who was his
only heir and next of kin, his aforesaid wife being dead; that
thereafter, on or about May 27th, 1889, the said Michael Larkin
executed and delivered a satisfaction to said Patrick Larkin of
said mortgage; that said conveyances by mortgage and deed
were recorded after the said execution in the clerk's office
of Ulster County; that an appeal was pending in said action,
May 1st, 1889, and had been noticed prior to that date by the
plaintiff for argument at General Term, to be held May 7th,
1889, at Albany, N. Y.; that said real estate is described in the

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- 7 deed to said Maria E. Larkin, which is recorded in Books of Deeds, No. 228, page 448, in Ulster County Clerk's office as follows: [*here followed a description of the realty*]

VI. That these conveyances and transfer of said real estate as aforesaid were made to cover up and conceal the right and title of the defendant Patrick Larkin thereto and in fact without any adequate consideration therefor, with intent to hinder, delay and defraud this plaintiff of her just suit, damages and claim against the said Patrick Larkin.

- 8 VII. That the written consideration stated in the said quit claim deed of said real estate, dated May 1st, 1889, from Patrick Larkin to his said daughter, Maria E. Larkin, is in these words: "In consideration of natural love and affection and the sum of one dollar;" that there was a further consideration therefor not written in said conveyance, made orally between parties thereto at the delivery of said deed, to the effect, and agreed to, that said Maria E. Larkin should take care of and furnish support for the said Patrick Larkin during his old age.

- 9 VIII. That said transfer of said real estate by Patrick Larkin to his said daughter, Maria E. Larkin, and the considerations therefor are fraudulent and void as to this plaintiff, and the same were made and had by the said parties thereto with the intent to hinder, delay and defraud this plaintiff of her just suit, demand, damages and claim against said Patrick Larkin, and to protect and save for his own use and benefit his said real estate during his life, and thereafter for the sole use and benefit of his said daughter and only heir, and to prevent and hinder this
10 plaintiff from collecting and receiving from the proceeds of any sale of said property on execution, or otherwise, the amount due her on her said judgment from said Patrick Larkin.

WHEREFORE, the plaintiff demands judgment, that the said conveyance by quit claim deed, dated May 1st, 1889, made by the defendant Patrick Larkin to the said Maria E. Larkin of the said real estate described herein, be adjudged and declared fraudulent and void as to this plaintiff, and that a receiver be appointed of all the property of said Patrick Larkin, to whom

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the defendants will be directed and required to convey said real 11
estate, and that said receiver be directed to sell the said property
and to pay out of the proceeds of said property the judgment of
the plaintiff aforesaid, and the costs and expenses of this action,
and hold the balance subject to the order of the court, and that
such other rule, order or relief may be granted to the plaintiff
as may be just in the premises, besides the costs of the action.

The Special Term of the Supreme Court dismissed the
complaint at the opening of the trial, on the ground that it did
not allege facts sufficient to constitute a cause of action. 12

The General Term affirmed the judgment.

The Court of Appeals reversed the judgment.

O'BRIEN, J. At the trial of this action, upon the defendants'
motion, the court, without taking any proof, dismissed the
complaint upon the ground that it did not state sufficient facts
to constitute a cause of action. To this ruling and direction the
plaintiff's counsel excepted. The appeal, therefore, presents
but a single question, and that is whether, in law, the complaint 13
was sufficient as a pleading to give the plaintiff a standing
before the court sufficient to enable her to make out her case by
proof if she could. The learned trial judge, as well as the
General Term, have apparently reached this conclusion upon
the theory that this court, when the case was here on a former
appeal, decided that sufficient facts had not been averred.
(Kain v. Larkin, 131 N. Y., 300.) In this respect we think that
the learned courts below have misapprehended the legal effect
of that decision. A careful reading of the opinion of this
court upon that appeal will show that we reversed the judgment 14
then before us, rendered after a full trial, upon the ground
that the facts and circumstances disclosed by the record, as it
then appeared, did not sustain the findings and conclusion of
the court which set aside, as void, the conveyance and transfer
attacked, and not because the complaint was defective. It is
true, that in discussing the questions then before us, and in
pointing out defects in the proof, it was remarked that certain
facts had not been proved nor alleged, but it is nowhere

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- 15 intimated that the complaint was defective, or that the necessary facts could not have been proven under it at the trial. Our decision proceeded upon the ground that the proofs, not the pleading, were defective and insufficient. It will be sufficiently favorable to the defendants to consider the complaint as now before us upon a general demurrer upon the ground that it does not state facts sufficient to constitute a cause of action. In such a case the demurrer cannot be sustained unless it appears, admitting all the facts alleged, that no cause of action whatever is stated. The demurrer cannot be sustained simply by showing
- 16 that facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that material facts are only argumentatively averred. The pleading may be deficient in technical language or in logical statement, but, as against a demurrer or a motion of this character at the trial, the pleading will be deemed to allege whatever can be implied from its statements by fair and reasonable intendment. (*Zabriskie v. Smith*, 13 N. Y., 330; *Marie v. Garrison*, 83 *id.*, 14, 23; *Sanders v. Soutter*, 126 *id.*, 193.) The complaint in this case
- 17 clearly avers the recovery of a judgment by the plaintiff against one of the defendants and the return of an execution issued thereon unsatisfied; that the judgment is still due; that after the cause of action accrued the defendant transferred his property which would be subject to the lien of an execution to his wife, daughter and brother by instruments particularly described, and that by the death of the wife and through a satisfaction of the mortgage on the real estate by the brother, and a deed to her by the plaintiff, all this property has become vested in and is now held by the daughter, who has been made
- 18 a defendant, and has answered the complaint. The complaint then avers that the deed, mortgage and transfer of money in bank to defendant's credit to his wife, daughter and brother, were made without consideration, and with the intent to hinder, delay and defraud the plaintiff of her claim. The relief demanded is that the conveyances and transfer be set aside and declared void, and that a receiver be appointed for the purpose of applying the property to the payment of the judgment. For the purpose of the question now before us, we can assume that these facts all stand

admitted upon the record, and when so admitted they establish 19
a cause of action by a judgment creditor against the defendant
in the execution, and his fraudulent grantees or transferees .
entitling him to equitable relief. A fraudulent intent on the
part of the grantor and grantee is averred. The evidence
necessary to support these allegations of a fraudulent intent may
be, and usually is, made up of many different facts and circum-
stances, but it is not necessary to insert them in a pleading, and
it is generally improper to do so. The pecuniary condition of
the defendant at the time, the extent of his property, the part 20
transferred and that retained, as well as the nature and extent of
the plaintiff's claim, which subsequently ripened into a judg-
ment, were all facts bearing on the general allegation of fraud.
The plaintiff could prove all these facts and circumstances under
her complaint. The general allegation that a conveyance or
transfer of property was made with the intent to hinder, delay
and defraud creditors is broad and sweeping in its operation and
effect. It involves many elements, and may, before it can be
deemed established, require proof of many other facts and
circumstances which may be given in evidence under the 21
general charge, without inserting them in the pleading. We
think that the plaintiff is entitled to an opportunity to prove
her case, and supply, if she can, the defects in the proof pointed
out by us in the review of the former judgment, and that the
direction dismissing the complaint was erroneous.

The judgment should be reversed and a new trial granted,
costs to abide the event.

All the judges concurred.

Judgment reversed.

Reed v. Stryker, 4 Abb. Ct. of App. Dec., 26.

REED v. STRYKER.

New York Court of Appeals, 1858.

[Reported in 4 Abb. Ct. of App. Dec., 26.]

A complaint by several judgment creditors, seeking to set aside several fraudulent conveyances made by the debtor at various times and to various persons, and to subject the property to the executions issued on plaintiff's judgment and to render the assignee for the benefit of creditors personally liable for violation of his trust,—states but one cause of action.

The various transferees of the property may be joined as defendants, although there was no privity between them.

- 1 Plaintiffs sued to set aside fraudulent conveyances made by defendant Stryker; the complaint alleged the recovery of several judgments against the defendant Stryker at various times and in various sums by the several plaintiffs; the issuance of executions thereon, etc., and it sought to set aside as fraudulent a conveyance by the debtor to his wife, three others at various times to his mother, and a general assignment for the benefit of creditors. The various transferees under the fraudulent conveyances were joined as defendants, and the assignee was sought to be held personally liable for violation of trust.

The defendant assignee demurred, on the ground that several causes of action were improperly united; that the matters relating to the assignment to him were separate from the others; and that he had no connection with the other matters.

The Special Term overruled the demurrer.

- 3 *The General Term* reversed the judgment of the Special Term, being of opinion that as the complaint did not allege a combination, confederacy or concert of action between the various transferees, there was no joint liability and the causes of action were several.

The Court of Appeals reversed the judgment of the General Term and affirmed that of the Special Term.

HARRIS, J. The single question in this case is, whether the complaint contained one or several causes of action. If several,

there is a misjoinder, for the several causes do not affect all the 4
defendants.

The plaintiffs severally are the judgment creditors of the defendant, Peter M. Stryker. Their executions are returned unsatisfied. They are still in pursuit of the property of their debtor. They bring this action, alleging that some of the property has been fraudulently conveyed to one of the defendants, some to another, and some to the third. The subject of the action is the debtor's property. The object of the action is to remove the illegal impediments which the defendants have placed in their way, so that the property of the debtor may be applied to the satisfaction of their debts. It is as much a single cause of action, as an action to foreclose a mortgage where persons having various and independant liens upon the mortgaged premises, some on one part, some on another, and still others on the whole, are made defendants. They are in no way connected with each other, but they are each interested in the subject, or object of the action, which is to have the mortgaged premises sold and the mortgage satisfied out of the proceeds; and because they are thus interested, they are not only proper, but necessary parties to the action. So, here, the plaintiffs seek to have the property which they find in the hands of these defendants—some in the hands of one, and some in the hands of another—and which, as they allege, has been fraudulently placed there, applied to the payment of their judgments. Each of the defendants has an interest in the controversy. Each is a necessary party to the complete determination of the questions involved in the action. 5 6

The case is not distinguishable from *Fellows v. Fellows*, 4 Cow., 682. In that case a decree in Chancery for the payment of money had been obtained against John Fellows, upon which an execution had been issued and returned unsatisfied. A bill was then filed against him to obtain satisfaction of the decree out of his property. His two sons, William and Thomas, and his son-in-law, Roswell Day, were made defendants. It was alleged that the property of John Fellows had been transferred by him without consideration, and fraudulently—a part to his son William, another part to his son Thomas, and another part 7

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- 8 to his son-in-law Day. Each defendant demurred to the bill, on the ground that he had been impleaded with the other defendants improperly; that the matters set forth in the bill were distinct and independent of each other. The demurrers were overruled by the chancellor, and upon appeal to the court for the correction of errors, after a most laborious discussion, in which the three justices of the Supreme Court participated, the decision was unanimously affirmed. WOODWORTH, J., said: "The claim against all the defendants is of the same nature. The fraud
9 alleged against them is the same. The question to be decided is in every respect the same. The transfer being fraudulent, the property was not changed by being put into the hands of the defendants. They hold the property of the debtor without title. They are, therefore, necessarily concerned in the thing to be recovered, although they set up distinct interests in separate parcels." SUTHERLAND, J., says: "The general right claimed by the bill is a due application of the property of John Fellows to the payment of the judgment. The subject of the bill and of the relief, and the only matter in litigation, is the
10 fraud charged in the management and disposition of that property, and in which charge all the defendants are implicated, though in different degrees and proportions. The defendants, therefore, have one common interest among them all, centering in the point in issue in the cause; and different matters of different natures are not demanded by the bill. It is one matter—the property of John Fellows—and the point in issue upon which the rights of all the parties must depend is, whether the transfer of that property to his sons and son-in-law was fraudulent or not." And SAVAGE, Ch. J., says: "Each of the
11 defendants separately, we must intend, conspired with John Fellows to defraud the plaintiff by collectively taking separate parts of the property and holding it for his benefit. There was no privity between William Fellows and Thomas Fellows and Roswell Day; but there was privity between each of them and John Fellows."

The same question was fully considered and discussed by Chancellor Kent, in *Brinckerhoff v. Brown*, 6 Johns., Ch. 139. In that case, the bill had much more of the character of

multifariousness than the complaint now in hand. There, as in 12 this case, the plaintiffs were distinct and unconnected judgment creditors. The judgments were against a corporation called the Genesee Manufacturing Company. The object of the plaintiffs was to obtain satisfaction of their judgments out of the property of the company, which, as they alleged, had been fraudulently withdrawn from their reach by the defendants. Some of the defendants were trustees of the company, and the bill sought to make them personally liable. Others were stockholders, and the bill sought to have them charged with the pay- 13 ment of their unpaid subscriptions. Two of the defendants had purchased personal property belonging to the company. There were numerous other charges against the defendants, in which their co-defendants were not shown to have any concern. There was a demurrer to the bill on the ground that it was multifarious. It was insisted that the matters of the bill were totally distinct and unconnected. The chancellor, after reviewing the facts of the case, proceeds to say that "it appears from the bill that all the defendants were not jointly concerned in every injurious act charged. There was a series of acts on the 14 part of the persons concerned in the company, all produced by the same fraudulent intent, and terminating in the deception and injury of the plaintiffs. The defendants performed different parts in the same drama. But it was still one piece, one entire performance, marked by different scenes." The demurrer was overruled.

In *Boyd v. Hoyt*, 5 Paige, 65, the bill was filed by judgment creditors of Hoyt, after the return of an execution unsatisfied, to reach property in the hands of the other defendants, one of whom was the son, and the other the son-in-law of the debtor, 15 and which it was alleged had been fraudulently transferred to them. It did not appear that the defendants had any joint interest in the property. On the contrary, it appeared that the property had been received by the son and son-in-law severally, and at different times. Upon demurrer for multifariousness, the chancellor said: "So far as the bill seeks to reach the property of Hoyt, which has come to the hands of the other defendants respectively, without consideration, and to

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16 have the same applied to the satisfaction of the balance due upon the plaintiff's judgment, there is no foundation for the objection that it is multifarious." And he added: "I have no doubt that two or more persons holding the property of the judgment debtor under different conveyances, or becoming indebted to him at different times, or for distinct sums, may be joined with him as defendants in creditors' bill." See also *Hammond v. Hudson River Iron & Machine Co.*, 20 Barb., 378.

Thus it appears that upon the point under consideration, the tenor of the authorities is uniform and decisive. The object of the suit is single. The plaintiffs, defeated in the collection of
17 their debts by the ordinary process of law, now seek to reach the property of their debtor in the hands of those to whom he has dishonestly conveyed it. However numerous the persons with whom the property has thus been deposited, however distinct the transactions by which the debtor has sought to place it beyond the reach of his creditors, or however widely it may have been scattered in the execution of this purpose, the effort to recover the property and have it applied to the satisfaction of the plaintiffs' debts, embraces but a single cause of action.

The judgment of the Supreme Court, at General Term, should be reversed, and that at the Special Term affirmed.

Blanc v. Blanc, 67 Hun, 384.

BLANC v. BLANC.

New York Supreme Court, General Term, First Dept., 1893.

[Reported in 67 Hun, 384.]

1. The Court have power to allow a defendant in divorce to serve a supplemental answer, setting up acts sustaining a counterclaim for divorce, though such acts were committed after the original answer was put in.
2. So, also, of acts first discovered after the original answer.
3. *It seems*, that adulteries committed by a plaintiff after suit brought, may be pleaded by leave of court both as a counterclaim and as a defence.
4. The fact that both parties have noticed the cause for trial does not deprive the court of power to allow either party leave to file a supplemental pleading, if leave be asked for without negligent delay.

Action for an absolute divorce.

1

The allegations of the complaint, omitting names and dates, were as follows:

I. That the plaintiff was married to the defendant in the city of New York, in the State of New York, on the——day of ——1887, at——church.

II. That the plaintiff and defendant are residents and inhabitants of the state of New York, and were such residents and inhabitants when the offenses hereinafter mentioned were committed. 2

III. On information and belief the plaintiff alleges that on or about the months of——and——18——, at the hotel known as the——No.——street, in——, the defendant committed adultery with one——.

[Other acts were alleged in the same manner.]

VII. On information and belief the plaintiff further alleges 3 that between the——day of——18——, and the commencement of this action the defendant committed adultery with divers persons in——and elsewhere.

VIII. That such adulteries were and each of them was committed without the consent, connivance, privity or procurement of this plaintiff.

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4 XI. That five years have not elapsed since the discovery by the plaintiff of the commission of said adulteries or any of them by the defendant, and that five years have not elapsed since the discovery of the said adulterous intercourse above set forth, and that this plaintiff has not voluntarily cohabited with the said defendant since the commission of any of the offenses above set forth and the discovery thereof by the plaintiff.

5 X. That there is no issue of the marriage between the plaintiff and the defendant, and no decree of divorce has been obtained by the defendant against this plaintiff in any of the courts of any of the States or territories of the United States.

WHEREFORE, the plaintiff demands judgment against the defendant that the bond of matrimony between the plaintiff and the defendant be forever dissolved, and for such other and further relief as to the court may seem just and proper, together with the costs and disbursements of this action.

6 The defendant's original answer admitted the marriage, the residence, and that there was no issue and no previous divorce, and denied all other allegations of the complaint.

It then alleged as follows, except that names and dates are here omitted :

Second.—For a second defence.

1. That on or about——at——hotel in——, the plaintiff being fully informed as to the acts of adultery alleged against defendant in the amended complaint herein, lived and cohabited with defendant, and freely condoned said alleged acts of adultery and forgave defendant therefor.

Third.—For a third defence and as a counterclaim.

7 1. [Here numerous charges of adultery committed by plaintiff were set forth in form similar to the allegations in the complaint.]

[*Thereafter followed allegations that five years had not elapsed since discovery, etc., and that there was no collusion, etc., no issue, and no divorce, in the same form as in the complaint.*]

3. That the plaintiff is seized and possessed of real and personal property to the amount of \$——, and that his annual income is at least \$——.

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WHEREFORE, defendant prays judgment that the bonds of 8
matrimony between herself and plaintiff be dissolved, and that
plaintiff be required to provide suitably for the maintenance and
support of the defendant, and for the costs of this action.

[Signature, etc.]

To this counterclaim plaintiff served a reply.

After the cause was at issue, and each party had been re-
quired to give the other a bill of particulars, and both had
noticed the cause for trial, defendant moved for and obtained 9
leave to serve a supplemental answer, alleging, besides all that
was continued in the original answer, several acts of adultery as
additional grounds for the counterclaim, all but one of which
had been committed since the original answer, and that one had
been discovered since the original answer.

The Court granted the motion "without prejudice to the
pleadings, and all the proceedings heretofore had and taken in
this action, issue to remain as of the date when the answer was
first due, and the case to retain its position on the calendar." 10

Plaintiff appealed.

The Supreme Court at General Term affirmed the order.

FOLLETT, J. Before the Codes, material facts occurring after
issue joined could be interposed by way of defence—mere matter
of resistance to the plaintiff's cause of action—in an action at
law, by a plea *puis d'arien* continuance (Grah. Pr., 296), or in a
suit in equity by a supplemental answer, or by a cross bill. (2
Barb. Ch. Pr., 256; Story's Eq. Pldg., § 903.)

Section 544 of the Code of Civil Procedure provides that the 11
court may permit a party "to make a supplemental complaint,
answer or reply, alleging material facts which occurred after his
former pleading, or of which he was ignorant when it was made.
The power of the court to permit the defendant to plead as a
defence acts of adultery committed by the plaintiff since the ac-
tion was begun cannot be doubted. Can such acts be pleaded as
a counterclaim? It will be observed that the section of the Code
above referred to, does not limit the use of facts interposed by a

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12 supplemental answer to the establishment of a defence to the plaintiff's alleged cause of action.

In an action for a divorce the defendant may plead the adultery of the plaintiff as a defence, and as a counterclaim, and if proved, the defendant being innocent, a divorce may be denied the former and granted the latter. (Code Civ. Pro., § 1770.) The right being given to the defendant to plead and prove the adultery of the plaintiff, though committed subsequent to the commencement of the action, it is difficult to see any good reason for denying the defendant affirmative relief. The defendant
13 having been found innocent and the plaintiff guilty of the matrimonial offense, why should the judicially established facts be available only as a defence, when, by granting complete relief, justice is done in one action and the delay, expense and scandal of a second suit avoided. Public policy, the interests of society and of the litigants alike demand that the rights of the parties should be determined in a single action, unless by so doing some statute or rule of procedure settled by reported cases is violated. No statute has been cited, nor have we been able to find one
14 which prohibits the granting of such relief. The precise question involved in the case at bar could not have arisen in this State before the Code of 1848, because our Court of Chancery never assumed the power to grant the innocent defendant a divorce for the adultery of the plaintiff, no matter whether it was committed before or after the suit brought. Such relief was only attainable by an original or by a cross bill. In *Milner v. Milner* (2 Edw. Ch., 114), the application of the plaintiff for leave to file a supplemental bill alleging acts of adultery by the defendant, after the filing of the original bill, was denied.
15 This case was followed in *Morange v. Morange*. (2 N. Y., Mo. Bull., 30.)

In *Smith v. Smith* (4 Paige, 432), it was held that in case a plaintiff committed adultery after suit brought for a divorce leave should be granted the defendant to set up the fact, as a defence, by a supplemental answer or by a cross bill. This case was followed in *Strong v. Strong* (3 Robt., 669 ; s. c. 28 How. Pr., 432). When the last case was decided it was a disputed question whether, under the old Code, affirmative relief could be granted in such

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an action to a defendant. (J. W. B. v. F. D. B., 11 N. Y., Leg. 16 Obs., 350; Anon., 17 Abb., 48; Leslie v. Leslie, 11 Abb. [N. S.], 311; Fullmer v. Fullmer, 6 N. Y., W. Dig., 22-42; R. F. H. v. S. H., 40 Barb., 9), and the report of the case does not show whether the fact was allowed as a counterclaim as well as a defence. In Cornwall v. Cornwall (30 Hun, 573), which was an action for a limited divorce, the plaintiff was granted leave to file a supplemental complaint alleging acts of cruelty committed after the commencement of the action, but it was intimated that the subsequent acts were proper in characterization of the earlier acts. This case is in harmony with the decisions in some of the States, which hold that acts of adultery committed after suit brought by the defendant with the person charged in the original pleading as a *particeps criminis* may be pleaded and proved for the purpose of characterizing their previous relations. (Browne Div., 58; see, also, Borham v. Borham, L. R., 2 P. & D., 193.) The question now before the court was not decided in any of the cases cited nor were the questions discussed in them nearly related to the point involved in the case at bar, but they are the only decisions found in the reports of 18 this State which throw light on this controversy, and there being no statute or decision in the way, we are of the opinion that under the Code of Civil Procedure adulteries committed by a plaintiff after suit brought may be pleaded by leave of the court, both as a counterclaim and as a defence.

The Ecclesiastical Courts of England gave affirmative relief to defendants (2 Bish. M. D. & S. S., 559), and when acts of adultery were committed by either party, subsequent to the commencement of the action, they could be alleged by a supplemental libel or answer, and if proved, were given the same force as though alleged in the original pleading. (Barrett v. Barrett, 1 Hag. Ec., 22; Webb v. Webb, *id.*, 349; Middleton v. Middleton, 2 Hag. Ec. Supp., 134; Brisco v. Brisco, 2 Add. Ec., 259.) 19

In New Hampshire, a supplemental complaint may be filed alleging acts of adultery committed after suit brought, which, if established, are a ground for a divorce. (Adam v. Adam, 20 N. H., 299.) In Kentucky grounds for a divorce *a mensa et thora* and for alimony, not existing when the original bill was filed,

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20 may be alleged in a supplemental bill, and, if proved, will support a decree. (*Butler v. Butler*, 4 Littell, 202; *Logan v. Logan*, 2 B. Mon., 142-148; *McCrocklin v. McCrocklin*, *id.*, 370.)

Without attempting to reconcile *Wheelock v. Lee* (74 N. Y., 495) and *Mackellar v. Rogers* (109 *id.*, 468), or to distinguish them from the case at bar, we think that the fact that both parties noticed the action for trial at a Special Term did not deprive the court of the power to permit a supplemental answer to
21 be served. All of the issues involved in the action, including those joined by the original and supplemental pleadings, must be tried before a jury unless both parties waive such a trial. Part of the issues should not be tried before the court without a jury, and the remainder before the court with a jury. There is nothing in the record which would justify this court in holding (contrary to the decision of the Special Term) that the motion was not made in bad faith and for the purpose of delay. When
22 the order was granted the case had been pending but six months, and it does not appear that the defendant was negligent in not moving at an earlier date.

The order should be affirmed, with ten dollars costs and printing disbursements.

VAN BRUNT, P. J. and O'BRIEN, J., concurred.

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ROSS v. SIMON.

N. Y. Court of Common Pleas, General Term, 1890.

[Reported in 9 N. Y. Supp., 536; s. c. 30 St. Rep., 545; rev'g. 8 N. Y. Supp., 2.]

1. The notice of a mechanic's lien, filed under N. Y. L., 1885, c. 342, §§ 1, 4, is sufficient if it contains the names of the persons against whose interests the lien is claimed, and the facts subjecting their interests to the lien.
2. In an action to foreclose a mechanic's lien, an allegation that the owner had full knowledge of the erection of the building, and consented to the same, and to the performance of the work by plaintiff, is sufficient, as against demurrer, to charge the owner's interest, under the statute (L. 1885, c. 342, § 1) providing that a person performing work, etc., "with the consent of the owner," may have a lien, etc.
3. It is not necessary to aver how, or under what circumstances, the consent of the owner was given.

Action to foreclose a mechanic's lien.

1

The allegations of the complaint were as follows :

First.—On information and belief, that at the times herein-after mentioned the defendant John Simon was and now is the owner in fee of all that certain lot of land situate, lying and being in the city of New York, known by the street number 2007 First avenue, and bounded and described as follows, viz. : [*Here was given description of the property.*]

Second.—On information and belief, that by instrument dated the twenty-eighth day of April, 1888, and recorded in the office of Register of the City and County of New York, on the thirteenth day of April, 1888, in liber 2129 of conveyances, page 346, the defendant John Simon leased said premises and the house thereon to the defendant Ignatz Schmitt for the term of twenty-one years, from the first day of May, 1888, who thereupon took possession thereof.

Third.—On information and belief, that by instrument dated the first day of September, 1888, and recorded in said office on the same day, in liber 2159 of conveyances, page 222, the defendant Ignatz Schmitt assigned said lease to the defendant

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- 3 Barbara Schmitt for the expressed nominal consideration of one dollar.

Fourth.—On information and belief, that at the time hereinafter mentioned the defendant Ignatz Schmitt was the duly authorized agent of the defendant Barbara Schmitt with reference to the altering, repairing and erecting of the buildings on said premises.

- 4 *Fifth.*—On information and belief, that subsequent to the making of said lease a contract was entered into by and between the defendants Allen B. Muir and Barbara Schmitt, whereby it was agreed that said Muir should do and perform certain work, labor and services, and furnish certain materials, in and about the erecting, altering and repairing of the house or building on the premises above described, and for which said defendant Barbara Schmitt agreed to pay said Muir the sum of two thousand one hundred and seventy-five dollars.

- 5 *Sixth.*—On information and belief, that said defendant Allen B. Muir duly performed all the conditions of said contract on his part to be performed, and so far completed the same as to become entitled, at all the times hereinafter mentioned, to receive thereon a sum largely in excess of the amount of the plaintiff's claim herein.

- 6 *Seventh.*—That on or about the seventeenth day of September, 1888, the plaintiff herein entered into a certain contract in writing with said defendant Allen B. Muir, whereby plaintiff agreed to do certain plastering and furnish certain materials for the building on said premises (being part of the labor and materials required to be furnished by the contract between the said Muir and Barbara Schmitt), for the sum of two hundred and forty-five dollars, of which sum one hundred and twenty-five dollars was to be paid when the brown coat was on, one hundred dollars when the white coat was on, and the balance when the plastering was done.

Eighth.—That in pursuance of said contracts, plaintiff did do the plastering and furnish the materials, as provided for in said contracts, and that the same were actually done and performed in and upon said building, and plaintiff has duly performed all the conditions of said contract on his part.

Ninth — That there has been paid on account of said contract the sum of one hundred and twenty-five dollars, leaving a balance due and owing of one hundred and twenty dollars. 7

Tenth.—That the defendant John Simon, the owner of the fee of said premises, had full knowledge of the erecting, altering and repairing of said buildings, and consented to the same and to the performance of the labor and supplying of the materials by this plaintiff as above set forth.

Eleventh.—That on or about the eighth day of November, 1888, and within ninety days after the completion of the contract above set forth, plaintiff duly filed a notice of lien in writing in the office of the Clerk of the City and County of New York; That said notice of lien contained the name and residence of this plaintiff, the claimant, the nature and amount of the labor and service performed and the materials furnished, with the names of the owner as hereinbefore given; the name of the person by whom the plaintiff was employed, together with a statement that the work for which the claim was made had been actually furnished; and contained a description of the property to be charged with the lien sufficient for identification. That said notice of lien was duly verified and complied in all respects with the requirement of the Statutes of the State of New York, and that on said eighth day of November, 1888, said lien was duly entered and docketed by said clerk in the lien docket kept in his office. A copy of said lien claim is hereto annexed. 8 9

Twelfth.—That within ten days after the filing of the notice of lien aforesaid, plaintiff caused a copy of such notice to be served upon the defendants John Simon and Barbara Schmitt.

Thirteenth.—That the defendant V. Loewers Gambrinus Brewing Company appears by the records to have a mortgage on said leasehold premises, and the defendants (naming other persons joined as defendants)—have filed liens against said premises all of which are subsequent and subordinate to the lien of the plaintiff herein, and the defendant Charles H. Baxter claims some interest which is subordinate to plaintiff's rights. 10

WHEREFORE, plaintiff demands judgment that he be adjudged to have a lien on said property for the sum of one hundred and twenty dollars and interest thereon; that the defendants and all

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- 11 persons claiming under them be foreclosed of all equity of redemption, or other interest in said premises; that the interests of the defendants John Simon, Ignatz Schmitt and Barbara Schmitt in said premises be sold, and that from the proceeds of such sale, the plaintiff be paid the amount of his said lien and interest thereon, together with expenses of sale and costs of this action; and in case of any deficiency that plaintiff have judgment therefor against the defendant Allen B. Muir, and that plaintiff may have such further judgment, decree, or order as may be necessary to protect his rights in the premises.

12 [Attached to the complaint was a copy of the notice of lien.]

The defendant Simon demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action against him.

The Special Term of the City Court sustained the demurrer.

- 13 *The General Term* affirmed the judgment; the court were of the opinion that the statement in the notice of lien that a lien was claimed against the leasehold interest was ineffectual, although the notice gave the name of the owner of the fee, to create a lien against such owner's interest; and that the allegation that the owner consented to the repairs was not alone sufficient.

The General Term of the Court of Common Pleas reversed the judgment.

- 14 DALY, J. The owner of the premises demurred because the lien, a copy of which is annexed to the complaint, did not contain the statement that the lien was claimed against the interest of the said owner; also on the ground that the allegation in the complaint that the defendant, the owner, had full knowledge of, and consented to, the doing of the work, was insufficient, there being no averment of any agreement or contract with him. The demurrer was sustained upon both grounds.

The lien act provides that persons performing work, etc., in erecting any house, etc., "with the consent of the owner," may have a lien upon the house and lot wherein it stands, and also provides that the notice of lien shall state "the name of owner, lessee, gen-

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eral assignee, or person in possession of the premises against whose interest a lien is claimed." (Laws 1885, c. 342, §§ 1, 4.) In the notice filed by this claimant is a statement that "the name of the owner of the leasehold against whose interest a lien is claimed is Ignatz Schmitt, and the owner of the fee of said premises is John Simon; that the name of the person by whom claimant was employed, and to whom he furnished such materials, is N. B. Muir; that said labor and materials were done and furnished with the knowledge and consent of John Simon, the owner of the fee of said premises." The notice thus contained a statement of the fact which, by statute, gives a lien upon the interest of the owner, viz., that the work was done with his consent; and such statement is sufficient notice to him and all others that the lien given by statute is claimed against his interest. It is not prescribed that the notice shall state, in so many words, that the lien is claimed against such persons, but that the names of the persons against whose interest the lien is claimed shall be given. If, therefore, the names are given, and the facts subjecting their interests to the lien are stated, the statute is satisfied. The fact that it is expressly stated in the plaintiff's notice that "the names of the owner of the leasehold estate against whose interest a lien is claimed" is not exclusive and does not stop the lienor from claiming also a lien against the interest of the owner. The case of *Moran v. Chase*, 52 N. Y., 346, is in point. That lease arose under the Kings and Queens Counties Act of 1862 (Sess. Laws, c. 478, § 3), which required the notice to state "the person against whom the claim is made, the name of the owner of the building, and the situation of the building;" and the notice stated that "the name of the person against whom the claim is made is S. B. Vreeland, and the said work and materials so furnished was by and at the request of said S. B. Vreeland," and that the owner was George K. Chase. It was held that a lien was acquired thereunder against Chase, the owner, notwithstanding the statement in the notice that the claim was against Vreeland only. This case is to be distinguished from *Jones vs. Manning*, 6 N. Y. Supp., 338, cited by appellant; for in that case the decision is put upon the ground that there was nothing in the notice to indicate that the lienor was seeking to place a lien upon

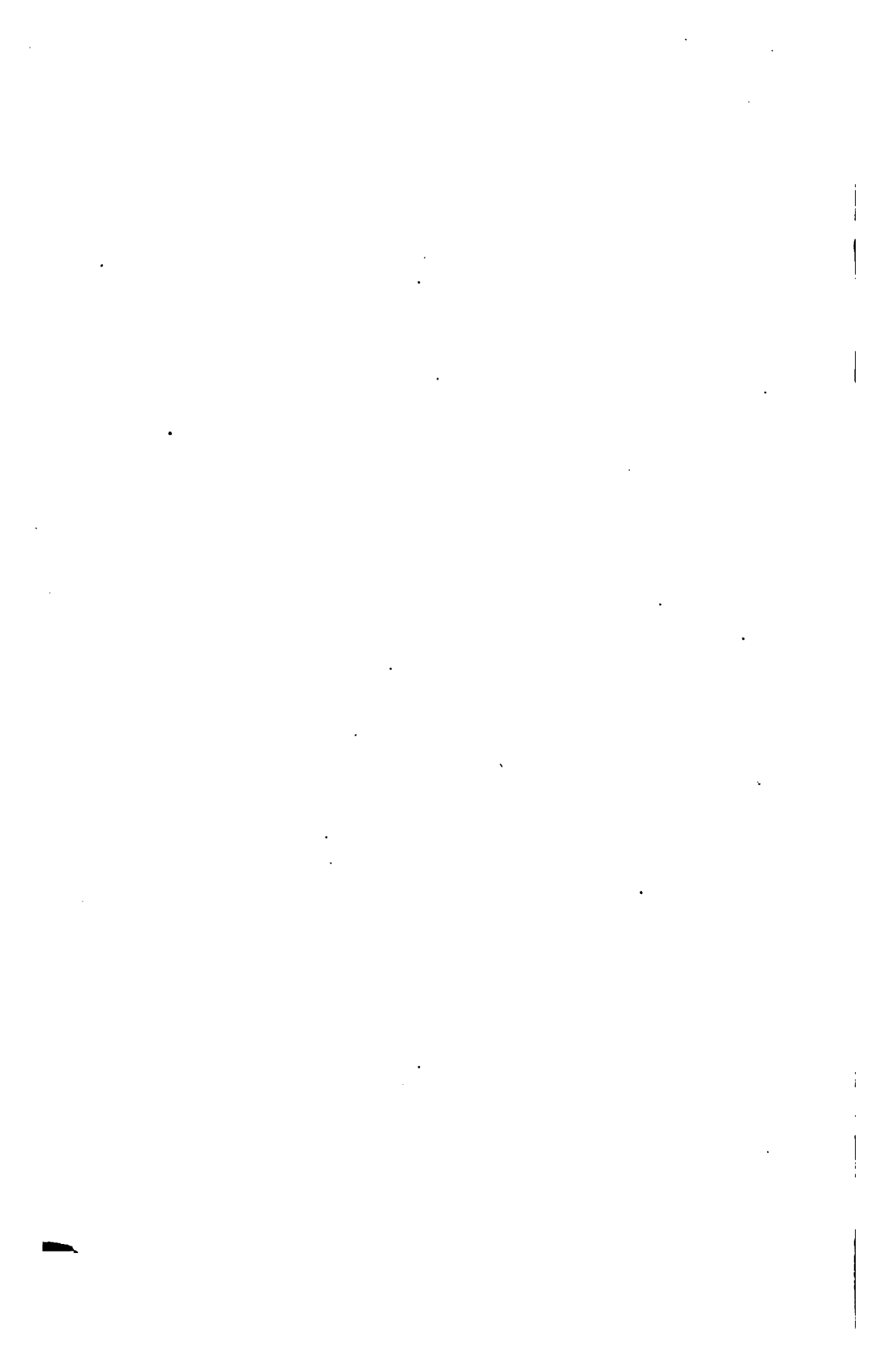
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- 19 the interest of the party named. Here the notice fully apprises all persons of the intent to charge the interest of the defendant. It remains to be considered whether the allegations of the complaint are sufficient as a statement of a cause of action against Simon, the owner. The complaint sets forth, in substance, that the defendant John Simon was and is the owner of the premises described in the complaint, being a lot of land in the city of New York; that he leased the lot and the house thereon for a term of 21 years from May 1, 1888, to the defendant Ignatz Schmitt, by instrument duly recorded; that Schmitt assigned
- 20 the lease to the defendant Barbara Schmitt; that the defendant Muir contracted with her to do certain work, labor and services, and furnish materials in and about the erecting, altering and repairing of the house or building on the premises, for the sum of \$2,175, and so far completed the same as to become entitled to receive a sum largely in excess of plaintiff's claim, who, under contract with Muir, did certain plastering and furnished materials for the said building for the sum of \$245, upon which there is due \$120; and that the defendant John Simon, the owner of the fee of
- 21 said premises, had full knowledge of the erecting, altering and repairing of said building, and consented to the same, and to the performance of the labor and supplying of the materials by the plaintiff as above set forth. The averment is, I think, sufficient under the statute. It is not necessary to aver how, or under what circumstances, the consent of the owner was given, any more than it would be necessary to set out the particulars of a contract if the averment had been that the work was done under or pursuant to a contract with him. In other words, the evidence in support of the allegation of consent is not to be pleaded.
- 22 What the liability, if any, of the owner may be found to be, upon the facts proved, is a wholly different question from that before us, which is a matter of pleading only. Under the lien act of 1873, c. 489, giving a lien upon the house and lot where the work is done and the materials are furnished "with the consent of the owner," it was held that the simple consent of the owner is sufficient, without proof of a contract by him for the improvements. (*Otis v. Dodd*, 90 N. Y., 336.) In that case the lease with the owner contained a covenant for the erection of the

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buildings and improvements, which were to become a part of the freehold, and not to be removed at the expiration of the lease : and the court approves the doctrine in *Nellis vs. Bellinger*, 6 Hun, 560, that the statute gives a lien as well where the owner consents to the erection of a structure upon his land as where he directly contracts for its construction ; and the decision in *Husted vs. Mathes*, 77 N. Y., 388, where the owner simply knew of the improvements made by her husband upon her land, and consented to them ; and it was held that her simple consent authorized the lien. Upon these authorities it is clear that the allegation of consent on the part of the owner is sufficient by way of pleading. We have not now to deal with the question whether the facts to be proved will bring the case within the authorities holding the owner liable, whether the consent proved does or does not amount to an authorization of the work, as stated in *Ottiwell vs. Muxlow* (in this court), 6 N. Y. Supp., 518. The judgment of the General and Special Terms should be reversed, and the demurrer overruled, and judgment upon the demurrer in favor of the plaintiff ordered, with costs, and if so adjudged by the City Court, with leave to defendant to answer upon payment of costs.

All concur.



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GILBERT v. YORK.

New York Court of Appeals, 1888.

[Reported in 111 N. Y., 544; aff'g 41 Hun, 594.]

1. The provision of Code Civ. Pro., § 481, as to the contents of a complaint—only saying that it must state the facts constituting the cause of action, and a demand of relief—is not exclusive of other necessary matter.
2. In an action in a court of limited and inferior jurisdiction, the complaint must allege the jurisdictional facts, or it will be presumed that the court is without jurisdiction.
3. The county courts in New York are—under the Constitution of New York, art. 6, § 15 as amended in 1873, and Code Civ. Pro., § 340, which defines the jurisdiction of county courts—courts of limited and inferior jurisdiction within this rule.
4. The complaint, therefore, in an action in a county court to recover a money judgment, must allege that the defendant is a resident of the county at the time of the commencement of the action.
5. The omission of such an allegation is a ground for demurrer; because, by reason of the presumption, the want of jurisdiction must be deemed to appear upon the face of the complaint.

Action for goods sold.

1

The only allegations of the complaint as to defendants' residence were:

That said defendants were in and during the year 1883, copartners, and doing business as grocers in the village of Forrestville, in said (Chautauqua) county, under the firm name of W. D. York & Son.

The defendants demurred to the complaint on the grounds: 2

I. That the complaint does not state facts sufficient to constitute a cause of action.

II. That the complaint does not state facts showing that the court has jurisdiction of the persons of the defendants.

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- 3 III. That the complaint does not state facts showing that the court has jurisdiction of the subject matter of this action.

IV. That it does not appear by the complaint that, at the time of the commencement of this action, the defendants were residents of Chautauqua county.

The County Court sustained the demurrer.

- 4 *The Supreme Court at General Term [to which an appeal from a final judgment of a county court lies under §§ 1340-45, Code Civ. Pro.]* affirmed the judgment, holding that county courts, under the provision of the State Constitution of 1846 (art. 6, § 15), and the Code Civ. Pro. (§ 340), are not courts of general jurisdiction, but are of a special, limited, and statutory jurisdiction; that therefore jurisdictional facts must be alleged.

The Court of Appeals affirmed the judgment.

- 5 ANDREWS, J. The case of *Frees v. Ford* (6 N. Y., 176) is a decisive authority upon the question presented in this record, unless the rules of pleading prescribed in the Code of Civil Procedure have changed the rule declared in that case, so that it is now unnecessary in an action brought in a County Court for the recovery of a money judgment, that the complaint should aver the jurisdictional fact that the defendant at the time of the commencement of the action is a resident of the county in which it is brought. The Constitution of 1846 ordained that the County Courts in the several counties, except New York, "shall have such jurisdiction in cases arising in Justices' Courts, and in special cases, as the legislature may prescribe, but shall have no original civil jurisdiction, except in such special cases." By the thirtieth
- 6 section of the judiciary act of 1847, passed in assumed execution of this constitutional authority, jurisdiction was conferred on the County Courts, of actions of debt, assumpsit and covenant, where the debt or damages claimed shall not exceed \$2,000, "when all of the defendants, at the time of commencing the action, shall reside in the county in which such court is held." The action of *Frees v. Ford* was commenced after the passage of the judiciary act, but before the enactment of the Code of 1848. The complaint in that case did not aver that the defend-

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ant resided in the county, and the defendant interposed a plea 7
to the jurisdiction, and the plaintiff demurred to the plea, the
intention of the parties being to present in this form, for the
determination of the court, the question of the constitutionality
of the thirtieth section of the judiciary act, the precise point being
whether an act of the legislature, conferring jurisdiction on the
County Courts in certain classes of common law actions, limited
only in respect of the amount claimed, and the residence of the
defendant, made the actions specified special cases within the
Constitution of 1846. The constitutionality of the act was 8
affirmed by the County Court and at the General Term, but
when the case came to this court the judges declined to pass
upon the constitutional question, but, applying the rule that on
demurrer judgment must go against the party who committed
the first fault in pleading, reversed the judgment of the courts
below on the ground that, assuming the constitutionality of the
thirtieth section of the judiciary act, nevertheless, the complaint
was fatally defective because it did not aver that the defendant
resided in the county at the commencement of the action. The
court in assigning the reasons for its judgment said: "The County 9
Court is not a court of general jurisdiction, as was the old
Court of Common Pleas; on the contrary, it is a new court with a
limited statutory jurisdiction. To all such courts the rule uni-
versally applies, that their jurisdiction must appear on the
record." In this way the court avoided deciding in that case the
constitutional question raised, but it was afterwards decided in
Kundolf v. Thalheimer, 12 N. Y., 593.

The rule declared in *Frees v. Ford*, that the residence of the
defendant in the county is a jurisdictional fact which must be 10
averred in a complaint in an action in the County Court, brought
under the judiciary act of 1847, would seem to be equally appli-
cable to an action brought since the constitutional amendment of
1873, and the enactment of section 340 of the Code of Civil Pro-
cedure, defining the jurisdiction of County Courts. The amend-
ment of 1873 declares that the County Courts shall have original
jurisdiction in all cases where the defendants reside in the
county, in which the damage claimed shall not exceed \$1,000.
This language, and that of section 340 of the Code, so far as rele-

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11 vant to the present inquiry, is substantially the same as the thirtieth section of the judiciary act of 1847, and if an averment of residence of the defendant in the county was essential under the act of 1847, the mere fact that the jurisdiction of County Courts is now defined by the Constitution, but in language substantially identical with the language of that act, would not seem to furnish a sufficient reason for changing the rule of pleading.

But the counsel for the plaintiff relies upon sections 481, 488 and 498 of the Code of Civil Procedure, and especially upon section 488, defining the causes of demurrer, in support of his
12 contention that in an action in the County Court an averment in the complaint of the residence of the defendant within the jurisdiction is no longer necessary. Section 481 is the general section, applicable to both the Supreme and County Court, specifying what a complaint must contain, and there is no specification which requires any averment as to the residence of the parties. But the prescription in this section, of matters which must be averred in the complaint, is not in terms exclusive. Section 488 authorizes a defendant to demur to a complaint where one or
13 more of eight objections specified "appear upon the face thereof," and among these objections are objections to the jurisdiction. Section 498 authorizes the objections specified in section 488 to be taken by answer where they do not appear on the face of the complaint. It is insisted that it does not appear on the face of the complaint that the defendant, at the commencement of the action, was not a resident of the county in which the action was brought, and that this jurisdictional fact may exist, although not stated therein, and consequently that the absence of jurisdiction not being disclosed on the face of the pleading,
14 the complaint is not demurrable under section 488, and that the case is one where the objection should be taken by answer under section 498. This argument is not without plausibility or force. But when we recur to the principle upon which the validity of judgments of courts of limited or inferior jurisdiction is determined, we think it may fairly be held that the sections of the Code referred to do not affect the rule declared in *Frees v. Ford*. In *Peacock v. Bell* (1 Saund., 73), it is said that "nothing shall be intended to

Gilbert v. York, 111 N. Y., 544.

be without the jurisdiction of a Superior Court but that which 15
specially appears to be so; and, on the contrary, nothing shall
be intended to be within the jurisdiction of an inferior court but
that which is so expressly alleged." This statement of the rule
has been frequently approved. The rule has been applied in
many cases in the Supreme Court of the United States to test
the validity of judgments rendered in the Circuit Courts of the
United States. The jurisdiction of those courts of suits between
individuals is made, by the act of Congress of 1789, to depend
upon the alienage of one of the parties, or upon the fact 16
that the plaintiff is a citizen of the State where the suit is
brought, and the defendant a citizen of another State. The Cir-
cuit Courts of the United States, although not inferior courts,
are courts of limited jurisdiction. It has been uniformly held that
the record of a judgment of a Circuit Court must affirmatively
show the existence of the jurisdictional fact, and that, unless the
contrary appears by the record, the presumption is that the case
was without its jurisdiction; and it is further held that the ques-
tion may be raised for the first time on error; and if on examin-
ation it is found that the record is silent as to the jurisdictional 17
fact, the judgment will be reversed. (*Stanley v. Prest*, etc., 4
Dallas, 8; *Robertson v. Cease*, 97 U. S., 646; *Grace v. Ins. Co.*,
109 *id.*, 283; *Continental Ins. Co. v. Rhodes*, 119 *id.*, 237.) It
was upon this principle that the case of *Frees v. Ford* was de-
cided. We are not aware of any case in this State which contro-
verts the general rule, that in a direct proceeding to review a
judgment of a court of limited and inferior jurisdiction the
record must show affirmatively that the court had jurisdiction,
or else the judgment will be set aside. *Frees v. Ford* is an 18
authority that the presumption that the inferior court is without
jurisdiction when the jurisdictional facts are not alleged in the
complaint, prevails on demurrer. What courts are to be regarded
as courts of limited jurisdiction, so that their proceedings shall
be affected by the presumption stated, is a question not always
free from difficulty. (*People v. Bradner*, 107 N. Y., 1.) But
that County Courts, as now organized, are of that description, is
a conclusion which seems to follow from the case of *Frees v.*
Ford. Construing the complaint in this action in view of the

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19 legal presumption, it follows that, there being no allegation therein as to the residence of the defendant, there is not simply an absence of any information in the complaint, one way or the other, as to the fact, but an affirmative presumption, from its silence upon the point, that the defendant was not a resident of the county when the action was commenced, and, therefore, the fact does appear on the face of the complaint that the County Court did not acquire jurisdiction; an objection which was properly taken by demurrer. The argument, derived from the rules of pleading established by the Code, does not satisfy us that the legislature intended to abrogate the presumption to which we have adverted, nor do we think that the fact that the jurisdiction of County Courts, of common-law actions like the present one, is now prescribed in the Constitution itself, and is not dependent upon the statute, takes the case out of its operation. They are still courts of limited jurisdiction within the case of *Frees v. Ford*.

20 These views lead to an affirmance of the judgment.

All concur.

Judgment affirmed.

WHEELOCK v. LEE.

New York Court of Appeals, 1878.

[Reported in 74 N. Y., 495; s. c. 5 Abb. N. C., 72, 80.]

1. A general appearance by a defendant sued in a local court — as, the City Court of Brooklyn — does not waive his right to object in his answer that the court has no jurisdiction of the subject matter of the action, if the case is such that the only element of locality which can exist, and the only means by which the cause can be brought within the territorial limits of jurisdiction of the court as a local court, is the service of the summons within those limits.
2. The principle upon which this rule depends is that to extend the jurisdiction of the court to cases not arising within its territorial jurisdiction, where the defendants do not reside, and are not served therein, would be to deprive it of its character as a local court.

Plaintiff brought an action in the City Court of Brooklyn to recover, as assignee, an excess of usurious interest, and to obtain

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possession of securities. The defendant appeared in the action and demurred on the ground of misjoinder and insufficiency. The demurrer was overruled, and defendant thereafter set up by answer that the action did not arise in Brooklyn but in New York city; that at the commencement thereof defendant did not reside in Brooklyn; that he never resided or had a place of business there; that the summons was served in New York city and not in Brooklyn; and that consequently the City Court of Brooklyn had no jurisdiction of the person of the defendant or of the cause of action. These allegations were substantiated by the evidence and findings. 1 2

The Special Term of the City Court gave judgment for plaintiff.

The General Term affirmed the judgment, being of opinion that, although the objection would have been good if taken in time, the raising and trying of an issue of law on other grounds before objecting to the court's jurisdiction was a waiver of such objection (citing Ogdensburg, etc., R. Co. v. Vermont, etc., R. Co. 63 N. Y. 176). 3

The Court of Appeals reversed the judgment.

RAPALLO, J. [*on this point, said*]: The defendant, by putting in a general appearance, followed by an answer setting up the want of jurisdiction, did not waive that defence.

This was expressly decided in the case of *Landers v. Staten Island R. R. Co.*, 53 N. Y., 450-460.; s. c. 14 Abb. Pr. N. S., 346.

The prevailing opinion in that case sets forth fully the grounds upon which it was held that the City Court was without jurisdiction. They are, in substance, that the City Court was a local court of limited jurisdiction at the time of the adoption of the judiciary article of the State Constitution in 1869, and that it was continued as such, and it was even beyond the power of the legislature to divest it of its local character; that its jurisdiction was limited to causes of action arising within its territorial limits, and cases in which the subject of the action was situated, or the party proceeded against resided or was served with process within 4

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5 those limits; that some one or more of these elements of locality must exist to confer upon the court jurisdiction of the cause. It follows that where none of them exist, a mere appearance does not preclude the defendant from taking the objection. Where no other ground of jurisdiction exists, the service within the county is a jurisdictional fact. Its omission is not cured by an appearance, for the objection is not simply that the court has not jurisdiction of the person of the defendant, but that it has not jurisdiction of the cause. (*Burckle v. Eckhart*, 3 N. Y., 132.)*

6 In a case in which the court had jurisdiction of the cause on some of the other grounds — as, for instance, where the cause of action arose within the city of Brooklyn — the general rule would apply that a general appearance cures any defect in the service of process to bring the defendant into court, and even the total absence of any service. But where, as in this case, the only element of locality which can exist, and the only means by which the cause can be brought within the jurisdiction of the court as a local court, is the service of the summons within a certain territory, that rule is not applicable, but the point having been expressly adjudged, it is not necessary to pursue it farther.

7 It is further claimed that the defendant, by interposing a demurrer to the complaint, precluded himself from setting up the defence of want of jurisdiction after his demurrer was overruled, and the case of *Ogdensburg R. R. v. Vermont R. R.*, 63 N. Y., 176, is cited as sustaining that position.

8 In that case a demurrer was interposed on the ground that it appeared on the face of the complaint that the court had not jurisdiction over the defendants, they being foreign corporations and non-residents. It was not held that by the fact of demurring the defendants waived this ground of demurrer.

On the contrary the demurrer was sustained in the Supreme Court and the plaintiff appealed to this court. The defendants moved to dismiss the appeal, which has been taken from the decision rendered in their favor, on the ground, among others, that they had not been served with process in the action. The case was not one in which the service of process, within any particular

* See also *Gibbs v. Queen Ins. Co.*, 63 N. Y., 114.

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locality, was a fact upon which the jurisdiction of the court over 9 the cause depended, nor was it analogous to the present case in any particular. In the present case leave was granted to the defendant to withdraw his demurrer and put in his answer. He availed himself of this leave, and answered, setting up facts showing that the City Court had no jurisdiction. The demurrer was then out of the case and formed no part of the record (*Brown v. Saratoga R. R. Co.*, 18 N. Y., 495). It is not available to either party for any purpose, and the fact that it was once interposed does not preclude the defendant from setting up the facts which 10 he might originally have set up by way of answer showing want of jurisdiction.

For the same reason that this objection was not waived by his appearance, it is not cured by the facts that he demurred and withdrew his demurrer.

The same facts existed in the case of *Hoag v. Lamont* (60 N. Y., 96), but they were not deemed material, and the subsequent defence by answer of want of jurisdiction was 11 sustained.

The principle upon which all these decisions rests is, that to extend the jurisdiction of the City Court to cases not arising within its jurisdiction, where the defendants do not reside and are not served therein, would be to deprive it of its character of a local court, and that some one of the specified elements of locality must exist to give it jurisdiction of the cause.

Under the decision cited, the defence of want of jurisdiction was established. 12

[*A ruling on another point is here omitted.*]

All the judges concurred, except MILLER and EARL, JJ., absent.

Judgment reversed.

Robinson v. Oceanic Steam Nav. Co., 112 N. Y., 315.

ROBINSON v. OCEANIC STEAM NAV. CO.

New York Court of Appeals, 1889.

[Reported in 112 N. Y., 315 ; aff'g 56 Super. Ct. (J. & S.), 108.]

- 2 1. A non-resident of the State does not by an appointment as administrator become a resident thereof, even for the purpose of suing as administrator.*
2. A cause of action under the statute for causing death by negligence or other wrongful act (C. C. P., §§ 1902-3), is for tort, and arises where the tort was committed.
3. A non-resident administrator cannot maintain an action in the courts of this State against a foreign corporation for negligently causing the death of his intestate without the State.
4. Jurisdiction of such action cannot be conferred by any consent or stipulation of the parties; but the objection may be taken at any stage of the action, and the court may, *ex mero motu*, at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action.

- 1 The action was commenced by personal service of the summons upon a managing agent of the defendant corporation in the city of New York. (See Code Civ. Pro., § 432.)

Defendant's attorneys served a general notice of appearance, containing a demand for a copy of the complaint. (See Code Civ. Pro., §§ 421, 479.)

The elements of the complaint were as follows :

- 2 Defendant, an English corporation transacting part of its business in New York, engaged as a common carrier across the Atlantic, the owner of two specified steamers of British registry. It received plaintiff's intestate as a passenger, and agreed to carry her with care, etc., and she paid her passage; at sea, 300 or more miles from New York, the two steamers collided, causing her death, without her fault; defendant's negligence and disregard of rules of navigation were the cause. That the death occurred within the territorial limits of Great Britain; the English Statute (Ld. Campbell's Act) was then set forth, etc. The surviving next of kin were then stated; the age and qualities of deceased, and the appointment of plaintiff as administra-

* See also Paget v. Stevens, 143 N. Y., 172.

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tor in New York. Judgment for \$15,000 damages was de- 3
manded.

The answer put in issue numerous allegations of the complaint:

As a separate defence—alleged that the alleged injuries were received if at all upon the high seas, and the British law did not give an action for death there caused.

And for a second separate defence—"That the court has not jurisdiction of the subject of the action."

And for a third separate defence—"That the complaint does 4
not state facts sufficient to constitute a cause of action."

After the cause had been put on the calendar, and noticed for trial by defendant, and set down for a specified day, defendant moved to vacate the summons and dismiss the complaint with costs on the ground that the plaintiff as administrator did not reside in the city of New York, and that therefore the court had no jurisdiction either under Code Civ. Pro., § 263, subd. 7 (as to the New York Superior Court), nor under § 1780 (as to foreign 5
corporations).

The fact of non-residence was not alleged in the answer, but it was shown by affidavit made in support of this motion that plaintiff resided in Fall River, Mass., and he was so described in the letters of administration, a copy of which was produced.

The Special Term of the Superior Court denied the motion, holding, on the authority of *McCormick vs. Penn. R. R. Co.*, 49, N. Y., 308, that the objection of non-residence constituted a matter of defence, which must be regarded as waived by a general appearance and answer; and that the action was transitory, 6
and in contemplation of law might be treated as having arisen in New York.

The General Term reversed the order of the Special Term and granted the motion, on grounds the same as those stated in the following opinion of the Court of Appeals:

The Court of Appeals affirmed the order of the General Term.

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7 EARL, J. [*after stating facts:*] The claim of the defendant is that as the plaintiff was a non-resident and the defendant was a foreign corporation, and the cause of action did not arise within the State, the court had no jurisdiction of the action, under section 1780 of the Code. The plaintiff contends that although he personally resided in the State of Massachusetts within the meaning of the section referred to, he was a resident of this State because he was here appointed administrator. But he was, nevertheless, personally a non-resident. Such a person may, under the statutes, be appointed an administrator, but he does not thereby become in any sense a resident of the State. (Coal Company v. Blatchford, 11 Wall., 172; Matter of Page, 107 N. Y., 266.) The case of Leonard v. Columbia Steam Navigation Company, 84 N. Y., 48, is not an authority upon this point for the plaintiff, as in that case the defendant was a domestic corporation.

8 It is true that the plaintiff's cause of action is transitory, and that a plaintiff may bring a suit upon such a cause of action wherever he may be, provided he can find a court which has jurisdiction of the action and can obtain jurisdiction of the defendant. But a cause of action, even if transitory, must always arise somewhere, and this cause of action arose where the tort was committed which caused the death of the plaintiff's intestate. That this is a cause of action for a tort is too clear for reasonable dispute. It exists only by virtue of the statute referred to, and is based entirely upon the negligence and tortious conduct attributable to the defendant. We, therefore, have a case where the plaintiff is a non-resident, the defendant a foreign corporation, and the cause of action did not arise within this State, and, therefore, no court within this State has jurisdiction of the action.

10 Under the Revised Statutes, so far as we are able to discover, there was no provision for an action in the courts of this State by a non-resident against a foreign corporation, and the only provision for suits against foreign corporations was that found in 2 Revised Statutes (459, p. 15), where it was provided that suits brought in the Supreme Court by a resident of this State against any corporation created by or under the laws of any other State, government or country for the recovery of any debt, claim or

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demand may be commenced by attachment. That provision remained until 1849, when, by section 107 of the laws of that year, it was amended so as to read as follows: "Suits may be brought in the Supreme Court, in the Superior Court of the city of New York, and in the Court of Common Pleas in and for the city and county of New York against any corporation created by or under the laws of any other State, government or country for the recovery of any debt or damages, whether liquidated or not, arising upon contract made, executed or delivered within the State, or upon any cause of action arising therein. Such suits may be commenced by complaint and summons, together with an attachment as provided by law, and such complaint and summons may be served as provided by sections 113 and 114 of the Code of Procedure." Under the section, as thus amended, any plaintiff could commence an action against a foreign corporation upon any cause of action arising within this State. In the same year section 427 was added to the Code of Procedure, providing as follows:

"An action against a corporation, created by or under the laws of any other State, government or country may be brought in the Supreme Court, the Superior Court of the city of New York, or the Court of Common Pleas for the city and county of New York in the following cases:

"1. By a resident of this State for any cause of action.

"2. By a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated within the State."

This section did not assume to define all the cases in which actions could be brought against foreign corporations, and did not absolutely limit the power and jurisdiction of the courts mentioned. It specified the cases in which foreign corporations could compulsorily, by service of process in the mode prescribed by law, be subjected to the jurisdiction of the courts. It did not deprive the courts of any of their general jurisdiction.

The Supreme Court, being a court of general jurisdiction, could, independently of any statute, entertain actions against foreign corporations. Such corporations could, by the common law, always be sued in this State by any plaintiff for any cause

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15 of action, provided jurisdiction be obtained of their persons (Morawetz on Corp., § 977, and cases cited in note); and so it was held, construing this section of the Code, in *McCormick v. Pennsylvania Railroad Company* (49 N. Y., 303). There the action was brought by a non-resident plaintiff against a foreign corporation for a cause of action which arose without the State, and it was held that the court could entertain the action because the defendant had appeared generally in the action, and submitted itself to the jurisdiction of the court, the cause of action being one of a class coming within its jurisdiction. Thus the
16 law remained until the Code of Civil Procedure was enacted, section 1780 of which provides as follows:

“An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident in one of the following cases only:

“1. Where the action is brought to recover damages for the breach of a contract made within the State, or relating to prop-
17 erty situated within the State, at the time of the making thereof.

“2. Where it is brought to recover real property situated within the State, or a chattel which is replevied within the state.

“3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.”

Under this section a resident of this State, a domestic corporation, can maintain an action against a foreign corporation for any cause of action, no matter where it arose. But an action by
18 a non-resident plaintiff against a foreign corporation can be maintained only in the cases specified, and in no case for a cause of action which arose outside of the State limits. The jurisdiction of the courts is defined and limited and absolutely confined to the cases specified; and the word “only” may have been, and probably was, inserted after the words “following cases” to change the rule as announced in *McCormick v. P. C. Railroad Company*.

The discrimination between resident and non-resident plaintiffs is probably based upon reasons of public policy, that our

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courts should not be vexed with litigations between non-resident 19 parties over causes of action which arose outside of our territorial limits. Every rule of comity and of natural justice and of convenience is satisfied by giving redress in our courts to non-resident litigants when the cause of action arose or the subject matter of the litigation is situated within this state.

It is not sufficient that a non-resident plaintiff should, by any service of process or in any other way, obtain jurisdiction of a foreign corporation; but before the action can be maintained, in any court of this State, there must also be jurisdiction of the subject-matter of the action. Jurisdiction of the action cannot be conferred upon the court by any consent or stipulation of the parties. 20 The objection to the jurisdiction in such case may be taken at any stage of the action, and the court may, *ex mero motu*, at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action. (Cooley's Const. Lim., 398; *Daidsburg v. Knickerbocker L. Ins. Co.*, 90 N. Y., 526.)

In the case cited *DANFORTH, J.*, said: "There are no doubt many cases where the court having jurisdiction over the subject-matter may proceed against a defendant who voluntarily submits 21 to its decision; but where the State prescribes conditions under which a court may act, those conditions cannot be dispensed with by litigants, for in such a case the particular condition or status of the defendant is made a jurisdictional fact."

It is claimed, however, that section 1780 of the Code, so far as it discriminates between resident and non-resident plaintiffs, is repugnant to section 2 of article 4, of the federal constitution, wherein it is provided that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." This section makes no discrimination between 22 citizens, but between residents and non-residents. Without attempting to define the full scope of that constitutional provision, it is sufficient to say that it has no application to a case like this, and there are numerous decisions to that effect. (*Adams v. Penn Bank*, 35 Hun, 393; *Frost v. Brisbin*, 19 Wend., 11; *Lemmon v. People*, 20 N. Y., 562; *Haney v. Marshall*, 9 Md., 194; *Campbell v. Morris*, 3 Harris & McHenry [Md.], 534; *Chemung Bank v. Lowery*, 93 U. S., 72; *McCready v. Virginia*, 94 *id.*, 396;

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23 Missouri v. Lewis, 101 *id.*, 22.) A construction of the constitutional limitation which would apply it to such a case as this would strike down a large body of laws which have existed in all the States from the foundation of the government, making some discrimination between residents and non-residents in legal proceedings and other matters.

The order should, therefore, be affirmed with costs.

All the judges concurred.

Order affirmed.

DODGE v. COLBY.

New York Court of Appeals, 1888.

[Reported in 108 N. Y., 445, aff'g 37 Hun, 515.]

1. A complaint which states a good cause of action in trespass *quare clausum fregit*, is not altered in character because upon the facts stated plaintiff might have recovered some of the damages alleged in an action of trover, so long as the gravamen of the charge be the unlawful entering upon real estate.*
2. The doctrine that the courts of this State have no jurisdiction of an action for trespass upon lands situated in other States reiterated—on demurrer.†
3. A demurrer cannot be sustained on a ground not specified in it, for Code Civ. Pro., § 490, requires the grounds to be specifically stated.
4. A complaint which, after stating plaintiff's ownership of large tracts of land in another state, alleged that defendant caused to be published and widely circulated the assertion that the plaintiff was not the owner, thereby preventing his sales of the lands, specifying particular sales lost, and adding that the assertions were false and defamatory, and made and circulated maliciously and with intent to injure plaintiff and his title,—*Held*, to constitute a good cause of action for slander of title.
5. Where the complaint joined a cause of action for trespass to real property with a cause of action for slander of title,—*Held*, that a demurrer on the ground of improper joinder of a cause of action of a transitory nature, of which the court had jurisdiction, with another for trespass on lands in another State, of which the court had no jurisdiction, was

*See Gilbert v. Pritchard p. 268 of this vol.

†On this point see now to the contrary *Sentinis v. Ladew*, 140 N. Y., 463, sustaining such an action after voluntary appearance and trial on the merits.

In the same manner the former doctrine that an action for personal tort committed abroad between foreigners was not within the jurisdiction of our courts (*Molony v. Dows*, 8 Abb. Pr., 316) was overruled in *Burdick v. Freeman*, 120 N. Y., 426.

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not authorized, and did not enable the demurrant to raise the objection that a cause of action for slander could not be joined with one for injuries to real property.

Action for slander of title and trespass on lands.

1

The complaint consisted of three statements, in substance as follows:

The *first* count alleged plaintiff's ownership in fee of lands in the State of Georgia, which lands were described by district numbers, and alleged to consist of upwards of 300,000 acres. That the defendant, and others acting in his employ, caused various persons to cut timber, and to take turpentine from said lands, and the said timber and turpentine were converted by defendant and his agents.

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The *second* cause of action was similarly stated as to ownership of the land, and alleged that defendant and his agents, by representing that plaintiff was not the owner of said lands, and that he (defendant) would protect against plaintiff all persons committing trespasses, had instigated and induced lawless and irresponsible persons to trespass upon said lands and remove timber and turpentine therefrom.

The *third* count charged the defendant with circulating the assertion that plaintiff was not the owner of said lands, and set forth various articles which, he charged, were published at the instigation of the defendant in various newspapers, in which such assertion was made; it further charged that defendant intended them to be, and that they were, widely circulated in various States, have become known to large numbers of persons wishing to purchase from plaintiff portions of said lands, and timber and turpentine therefrom, and that in consequence plaintiff has lost the sales. Plaintiff then specifies persons, who, among others, he alleges, were ready and willing, and would have purchased lands and timber and turpentine, and paid plaintiff a price specified, but that by reason of defendant's said assertions he has been prevented from consummating the sales. Then follows this averment: "That the plaintiff charges that the statements and assertions hereinbefore mentioned, in so far as they represent, either directly or indirectly, and in whatever language, that the plaintiff was not the owner of or

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- 5 interested in the said lands, or that the defendant, and those for whom he alleges he is acting, did own the same, were false and defamatory, and were made and caused to be circulated and published by the defendant and by his agents maliciously and with the intent to injure the plaintiff and his title to the said lands."

The defendant demurred to the complaint on the following grounds:

- 6 1. That the court has no jurisdiction of the subject of the action.
2. That the complaint does not state facts sufficient to constitute a cause of action.
3. That causes of action have been improperly united, viz.: a cause of action for a slander of title, being a transitory action, with two causes of action for trespasses on lands without the State, of which the court has no jurisdiction.

The Supreme Court at Special Term overruled the demurrer on the ground that "the complaint shows a cause of action.

- 7 Whether it can go to the full extent asked or not is another question."

The General Term reversed the judgment, holding:—That as to the first and second counts, a cause of action for trespass was stated in each, and as the real estate upon which the trespasses were committed was situated outside the State, the court had no jurisdiction. That the third count, purporting to be for slander of title, was fatally defective in not alleging that the denial of plaintiff's title was maliciously made. That causes
8 of action were improperly joined, for by § 484 of the Code an action for slander cannot be joined with an action for injuries to real property.

The Court of Appeals affirmed the judgment of the General Term, except so far as it related to the third count, and as to that reversed the judgment and affirmed that of the Special Term.

RUGER, Ch. J. [*after stating the grounds of demurrer, the decision at Special Term and the General Term conclusions as to the first two causes of action, said*]: "We concur in the con-

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clusions reached by that court in respect to this portion of the 9
complaint. The counts referred to, we think, under the liberal
system established by the Code, each clearly stated a good cause
of action in trespass *quare clausum fregit* and entitled the
plaintiff, if sustained, to recover for all damages accruing to him
from the acts described therein. It constitutes no answer to
this proposition that the plaintiff might have recovered, upon the
facts stated, some of the damages alleged to have been sus-
tained by him in an action of trover, so long as the *gravamen* of
the charge was the unlawful intrusion upon his real estate. The
cutting and tapping of trees constituted the real basis of the 10
damages claimed. While the counts referred to, each allege the
value of the timber and turpentine claimed to have been carried
away from the premises of the plaintiff, this is merely incidental
to the trespass alleged, and the complaint concludes with a
general prayer for judgment which would cover the damages
arising from the alleged unlawful entry upon the plaintiff's
lands and the trespasses committed thereon, as well as the inci-
dental damages arising from the conversion of his property.

The doctrine that the courts of this State have no jurisdiction 11
of actions for trespass upon lands situated in other States is too
well settled to admit of discussion or dispute. (*American Union
Tel. Co. v. Middleton*, 80 N. Y., 408; *Cragin v. Lovell*, 88 *id.*,
258.) The claim urged by the plaintiff, that if not permitted to
maintain this action he is without remedy for a most serious in-
jury, is quite groundless, and affords no reason for the assump-
tion of a jurisdiction by this court which it does not possess.
The plaintiff would seem to have the same remedy for the tres-
passes alleged that all other parties have for similar injuries.
His lands cannot be intruded upon without the presence in 12
the State of the wrongdoer, and no reason is suggested why he
could not seek his remedy against the actual wrongdoers in the
courts having jurisdiction. His remedy is ample, and it is no
excuse for assuming a jurisdiction which we do not have, that
the plaintiff desires a remedy against a particular person, rather
than one against the real perpetrators of the injury, who were ex-
posed to prosecution in the place where the wrong was com-
mitted.

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- 13 We, are, however, unable to agree with the General Term in the conclusion reached by it, that the third count does not state a good cause of action. We are inclined to think that this result was arrived at through inadvertence in failing to observe the allegation in the count, that the statements alleged to be slanderous "were false and defamatory and were made and caused to be circulated and published by the defendant and his agents maliciously and with the intent to injure the said plaintiff and his title to the said lands." The demurrer concedes the truth of this allegation, and renders it improper for the court to
- 14 refer to the statements so alleged to be false, defamatory and malicious, as the foundation of a claim that they were made in good faith and in the exercise of a lawful right on the part of the defendant to assert his title to the lands referred to.

The statement in the complaint that the defendant alleged that his title had been investigated by four able legal gentlemen, who unanimously concurred in pronouncing the plaintiff's title bad, was precisely one of the statements which the complaint alleged to have been false, defamatory and malicious, and the

15 truth of which characterization was admitted by the demurrer. It was error, therefore, in the court below to refer to this statement as proof of the propriety of the defendant's claim to be the owner of the lands, or as justifying, in any degree, the alleged slanderous statements.

- We are of the opinion that this count of the complaint substantially complied with the requirements of the rule relating to the statement of a cause of action for slander upon title. The General Term, we think, also erred in sustaining the demurrer to the third count, upon the ground that there was an improper
- 16 joinder of causes of action. It is quite true that, under § 484 of the Code of Civil Procedure, causes of actions for slander cannot properly be joined with actions for injuries to real property; but this was not the ground of objection stated in the demurrer. The ground there specified was that a cause of action of a transitory nature, of which the court had jurisdiction, had been united with one for trespasses upon land in another State of which the court had no jurisdiction. This is not one of the grounds of demurrer authorized by the Code. It is a

Cragin v. Lovell, 88 N. Y., 258.

proper ground of demurrer that the court has not jurisdiction of 17 any specified cause of action, but this does not authorize a demurrer, upon the ground that such causes of action are united with one of which it has jurisdiction.

The first and second counts of the complaint must be held bad, upon the ground that the court had not jurisdiction of the subject of the action; but no sufficient ground of demurrer has been presented to the third count, and it must, therefore, be held good. The Code requires the grounds of demurrer to be specifically stated, and when that is not done it may safely be disregarded. (Code of Civ. Pro., § 490.) 18

Our conclusion, therefore, is that the judgment of the General Term should be affirmed, except in so far as it relates to the third count, and as to that it should be reversed, and that of the Special Term affirmed, without costs to either party upon this appeal.

All the judges concurred.

Judgment accordingly.

Cragin v. Lovell.

New York Court of Appeals, 1882.

[Reported in 88 N. Y., 258; rev'g 22 Hun, 101.]

1. A separate defence may contain all the requisite allegations within itself to make it a perfect counterclaim, or it may refer to papers annexed, or to other parts of the answer, or to the complaint, with the same effect as if the matter so referred to was written at length therein. Such matter is to be deemed to "appear on the face" of the pleading in which it is sufficiently so referred to, within the rule as to demurrer.
2. The Supreme Court of this State has no jurisdiction of an action for damages for waste committed to lands situated outside of the State, either at common law, or under Code Civ. Pro., § 982—which declares that an action for waste must be tried in the county where the land is situated.—*So held* on demurrer.*
3. A defendant cannot use as a counterclaim a cause of action of the subject of which the court, before which the action is pending, has no jurisdiction.

* See note to preceding case.

Cragin v. Lovell, 88 N. Y., 258.

1 Action for breach of contract.

This action was originally commenced against Eliza A. Quitman individually and as executrix of her sister Louise S. Quitman. The original defendant died after issue was joined; the action was continued against the present defendant as her executor.

2 The complaint in the action alleged, that early in the year 1870, the defendant and her sister [Louise] had sold and conveyed to one Fisk, a certain plantation known as "Live Oaks," situated in the parish of Terrebonne and State of Louisiana, for the consideration of \$4,500 in cash, and \$18,000 in the notes of Fisk, secured by a mortgage upon the plantation; that the plaintiff, at the time named, had a large judgment against Fisk, who had absconded, and that he, as a means of satisfying the judgment in part, took possession of the plantation, the legal title thereto, however, remaining in Fisk; that the plaintiff entered into an agreement with the defendant and her sister, by which he was to be permitted to acquire the legal title to the plantation by paying up the notes secured by the mortgage, and then foreclosing the mortgage; that, relying upon the agreement, he

3 paid two of the notes and made various permanent improvements upon the plantation; that the defendant and her sister subsequently violated their agreement, and the plaintiff in consequence thereof, sustained damage to the amount of \$10,000, for which sum he demanded judgment.

The defendant in her [amended] answer, as the fourth subdivision thereof, alleged:

4 " For a fourth and further answer, defendant alleges upon information and belief that during the time while plaintiff was in the possession of the said "Live Oaks," claiming to be owner, and at the time the improvements on the said premises are alleged to have been made by him, and while recognizing the validity of defendant's lien, and as a part of the same transaction out of which the alleged cause of action arises, this plaintiff unnecessarily broke, destroyed, injured and wasted the said plantation, and the fences, buildings, outbuildings, fixtures, appurtenances and improvement to the property, and so carried on the business of the plantation and conducted the tillage and cultivation thereof, that the same was greatly damaged in the

Cragin v. Lovell, 88 N. Y., 238.

amount of at least \$6,000, for which sum the defendant asks judgment, and which amount she counterclaims in this action." 5

The plaintiff demurred to the counterclaim "for the reason that it appears that the court has not jurisdiction of the subject thereof."

The Supreme Court at Special Term overruled the demurrer, and gave judgment for defendant upon the counterclaim.

The Supreme Court at General Term affirmed the judgment, on the ground that it did not appear upon the face of the answer that the property upon which the waste was done, was situated outside of this State; although if this fact had appeared, the demurrer would have been well taken. 6

The Court of Appeals reversed the judgment.

EARL, J. [*after recapitulating the pleadings*]:

Section 495 of the Code of Civil Procedure provides that "the plaintiff may demur to a counterclaim upon which the defendant demands an affirmative judgment where one or more of the following objections thereto appear on the face of the counterclaim," and the first subdivision is, "that the court has not jurisdiction of the subject thereof." 7

Does this objection appear upon the face of the counterclaim? We think that it does. A separate defense may contain all the requisite allegations within itself to make it a perfect counterclaim, or it may refer to papers annexed, or to other parts of the answer, or to the complaint, and the matters thus referred to are just as much a part of the counterclaim as if written at length therein. The same rule is applicable in the construction of all written instruments. Whatever is plainly referred to as part of a written instrument must always be considered in the construction thereof. Here the plantation is plainly described in the complaint as situated in Louisiana, and its situation there is not denied. The answer is drawn to meet the allegations contained in the complaint, and plainly refers to such allegations. In the second division of the answer the plantation is referred to as the one known as "Live Oaks mentioned in the complaint." In the third division of the answer the defendant denies 8

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9 that "this court has jurisdiction of the subject matter of this action as to the claim for damages for improvements alleged to have been made by plaintiff to real estate, situated in the State Louisiana," etc., and thus it is shown that the real estate which is connected with the subject of the litigation is situated in that State. Then in the fourth subdivision of the answer containing the counterclaim, the same plantation and real estate are several times referred to.

To hold under such circumstances that the real estate referred to in the counterclaim is not situated in the State of Louisiana
10 requires a construction altogether too rigid and narrow, and we are of the opinion that it sufficiently appears upon the face of the counterclaim that it is thus situated.

We have now only to inquire whether the defendant could properly allege as a counterclaim the damages sustained by waste committed to land situated outside of this State.

If the defendant had sued the plaintiff upon the cause of action alleged in her counterclaim, a demurrer to her complaint on the ground that the court did not have jurisdiction of the subject of
11 the action would have been sustained. It is a general rule of law that actions for injuries to real property must be brought in the *forum rei sitæ*, and this rule of law has been, so far as I can discover, uniformly sanctioned and upheld in this State. (Story on Conflict of Laws, § 554; Watts' Admrs. v. Kinney, 23 Wend., 485; s. c. 6 Hill, 82; American Union Telegraph Co. v. Middleton, 80 N. Y., 408; De Courcy v. Stewart, 20 Hun, 561.) It is a mistake to suppose that this rule has been changed by section 982 of the Code.* That section was not intended to define the ju-

12 * § 982. Each of the following actions must be tried in the county in which the subject of the action, or some part thereof, is situated: an action of ejectment; for the partition of real property; for dower; to foreclose a mortgage upon real property, or upon a chattel real; to compel the determination of a claim to real property; for waste; for a nuisance; or to procure a judgment, directing a conveyance of real property; and every other action to recover, or to procure a judgment, establishing, determining, defining, forfeiting, annulling, or otherwise affecting, an estate, right, title, lien, or other interest, in real property, or a chattel real.

But where all the real property, to which the action relates, is situated without the State, the action must be tried, as prescribed in section nine hundred and eighty-four of this act.

Note on the Locality of a Cause of Action.

risdiction of the Supreme Court, but simply to determine the 13 place of trial of actions, of which it had jurisdiction. In the last two cases above cited the actions were commenced after that section took effect, and it cannot be supposed that it was overlooked in the decisions of those cases. All parts of the section can have effect without extending the jurisdiction of the court to actions like this counter-claim, which were always regarded as triable only where the cause of action arose.

But the claim is made that even if the defendant could not have sued the plaintiff upon this cause of action within this State, she might yet set it up as a counter-claim. By section 501 of 14 the Code a counter-claim is defined to be a cause of action against the plaintiff in favor of the defendant. It must then be a cause of action upon which the defendant could sue the plaintiff, and which he holds and possesses against the plaintiff at the place where the action is commenced. A defendant cannot avail himself of a counter-claim which the court before which the action is pending has no jurisdiction to try and determine. A counter-claim must be a complete cause of action existing in favor of the defendant where he asserts it; otherwise he has no 15 counter-claim there.

It follows from these views that the judgment should be reversed, and judgment should be given for the plaintiff upon the demurrer, with costs.

All the judges concurred, except ANDREWS, Ch. J., and RAP-ALLO, J., not voting.

Judgment reversed.

NOTE ON THE QUESTION WHAT IS TO BE DEEMED
THE PLACE WHERE THE CAUSE OF
ACTION AROSE.

The question what is to be deemed the place where the cause of action 1 arose, may be presented for either of several purposes: It may be presented as affecting the jurisdiction of a local court, as in case of the superior city courts in actions other than those affecting real property (Code Civ. Pro., § 263, subd. 2 and subd. 7), it may be presented as affecting the jurisdiction of the Supreme Court as well as any other court, of an action brought by a foreign corporation or a non-resident against a foreign

Note on the Locality of a Cause of Action.

- 2 corporation (§ 1780), and it may be presented as affecting the question of the proper place of trial in an action in the Supreme Court (§ 983), and, where several causes of action require different places of trial, the misjoinder may be objected to on the pleadings (§ 484).

Whenever the situation of persons or property has reached such a condition as to justify invoking the judicial power by an action, a cause of action is said to have arisen. If this justiciable condition is produced by a single act—as for instance an assault—the time and the place are inherent in the act itself, and proving the latter in detail proves both former. It makes no difference in such case that subsequent events at the same or at another place enhance or mitigate the damages. The time and place of accrual are fixed at the outset, subject only to the principle that a continuing wrong may be deemed in some cases a continually accruing succession of causes of action. (See note on the time when a cause of action accrues, in 26 Abb. N. C., 3.) If the justiciable condition is produced by a succession of events, each necessary to the resulting condition, as in the case of a contract made by defendant and subsequently broken by him, it is clear that the time of accrual is fixed by the latest of these necessary events.

- 4 It is well to notice, in this connection, a consideration of justice which introduces some anomaly. In those classes of cases where a plaintiff must perfect his cause of action by some affirmative step on his own part—such as a demand required by the terms of his contract, or a notice or presentation of claim against a municipality—the act is a part of his cause of action within the rules of pleading and proof; and an action commenced before he has done the act is premature; but the act is not necessarily a part of his cause of action for the purposes of the statute of limitations because he otherwise might intentionally delay it till after defendant's evidence as to the principal transactions had been lost.

See the cases on the question, collated particularly with reference to actions on contract, in 28 Abb. N. C., 435 :

1. Some refer to the place where the contract was made.
2. Others to the place where the consideration was furnished.
3. Others still—and this is now the prevailing test—to the place where the breach occurred.

- 5 There are divergent authorities as to where the breach should be deemed to occur, some holding :

- (a.) That the breach arises at the place where defendant is when he refuses.
- (b.) The place of refusal, or where plaintiff is notified of defendant's refusal.
- (c.) Where defendant should have performed, but did not.

Polley v. Wilkisson, 5 Civ. Pro. Rep., 135.

POLLEY v. WILKISSON.

City Court of Brooklyn, General Term, 1884.

[Reported in 5 Civ. Pro. Rep., 135.]

1. A cause of action for trespass upon land, and a cause of action for conversion of personal property may be united, under Code Civ. Pro., § 484, subd. 9, when they both arise out of the same transaction.
2. A fair interpretation of the term "transaction" as used in the Code, does not confine it to a single one of a series of connected acts transpiring at the same time; it means something broad enough to embrace causes of action belonging to the different subdivisions of § 484.
3. The word "transaction," as used in § 484, is comprehensive enough to include the breaking into a market stand, tearing down partition, fixtures, etc., locking it up and carrying away the goods and fixtures, when done at the same time, these acts are all parts of the same transaction.
4. Neither trespass upon real property, nor trover, is a local action.

Demurrer to complaint on the ground that causes of action have been improperly united. The facts essential to the decision sufficiently appear in the opinion. 1

REYNOLDS, J. Conceding that the 4th paragraph of the complaint sets out a cause of action for trespass upon land, and the 5th paragraph a cause of action for conversion of personal property, I think the two may be united under subd. 9 of section 484 of the present Code, on the ground that they both arise out of the same transaction. Taking the two paragraphs together, they set out in substance that defendants violently entered upon the premises lawfully occupied by plaintiff, locked him out, and deprived him of possession, and that in so doing they broke down walls and partitions, destroyed his signs and fixtures in and upon the premises, and at the same time took and carried away the fixtures and other personal property of plaintiff and converted the same to their own use. All this, though stated in separate paragraphs was one continuous *transaction*. A fair interpretation of that term, as used in the Code, does not confine it to a single one of a series of connected acts transpiring at the same time, if so, each blow struck, each wall or partition 2

Polley v. Wilkisson, 5 Civ. Pro. Rep., 135.

- 3 broken down, each article carried away, would be a transaction by itself. It means something broad enough to embrace more than one cause of action, broad enough even to embrace causes of action belonging to different subdivisions of the section, for the only construction I can put upon this 9th subdivision which seems to me at all sensible, is that claims or causes of action which are not all included in any one of the foregoing subdivisions, that is, which belong to different ones, may, notwithstanding, be united, provided they arise out of the same transaction or transactions connected with the same subject of
- 4 action. The words "not included within one of the foregoing subdivisions of this section," mean not included within one only, but belonging to more than one claim—belonging to one only, are already provided for; those belonging to more than one, but arising out of the same transaction, etc., are provided for by subd. 9. The word "transaction" used in such a connection as well as in common parlance is comprehensive enough to include the breaking into a market stand, tearing down partitions, fixtures, etc., locking it up and carrying away the goods and
- 5 fixtures; when done at the same time, these acts are all parts of the same transaction.

Counsel for appellant seems to suppose, however, that the concluding part of the section requires that causes of action, to be united, must in all cases belong to one, and one only, of the first eight subdivisions. The language is that "it must appear upon the face of the complaint that all the causes of action so united, belong to one of the foregoing subdivisions of this section," etc. The trouble with this is that subd. 9 is one of the "foregoing subdivisions" as well as the eight others, and to

6 give effect to the whole, it is necessary to hold that any and all causes of action "*arising out of the same transaction*" are a class by themselves, which may be united, provided they meet the other conditions contained in the closing paragraph of this section. It is said, however, that these two causes of action require different places of trial. Not at all—neither of them are local; sections 982 to 984 of the Code regulate this subject and neither trover nor trespass upon real estate is included under either of these sections. The interlocutory judgment should be

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affirmed without costs, with leave to defendant to answer upon 7
the terms given in the Special Term order.

No costs of this appeal, as the question seems to be novel.

CLEMENT, J., concurred.

NICHOLS v. DREW.

New York Court of Appeals, 1883.

[Reported in 94 N. Y., 22; aff'g 25 Hun, 315.]

1. If a complaint contains two causes of action, one of which affects all of the defendants, and the other of which does not, a defendant who is not affected by both causes of action may demur; but the proper ground to assign is that there is a misjoinder of causes of action, not that there is a misjoinder of parties.
- 2 The rule that a defendant against whom a good cause of action is alleged, may not demur because too many parties are joined, does not preclude demurring to a misjoinder of causes of action where parties who are necessary as defendants as to one are not proper defendants as to the other.

The elements of the first cause of action were: That the 1
defendants Drew, Young and McLane became jointly indebted
to plaintiff in a specified sum for the board of their workmen.

That the defendants nominally failed, and Drew conspired
with Churchill to cheat plaintiff out of his claim.

To that end Churchill offered to buy plaintiff's claim for
twenty-five cents on the dollar and made false and fraudulent
representations as to Drew's pecuniary condition and his own
motive, which he knew to be false.

That plaintiff in reliance thereon was induced to assign to 2
Churchill his claim for that price.

That in fact Drew was solvent, and the money Churchill paid
was furnished by Drew and the assignment turned over to
Drew.

Plaintiff's damages were laid at the amount of the claim less
the sum paid for the assignment.

The elements of the second cause of action were (after
repeating by reference all the allegations of the first):

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3 That before such assignment Drew and Young represented to plaintiff that there was a sum of \$250 belonging to them in the hands of third persons which they verbally assigned to plaintiff, to be received by him in addition to the 25 cents on the dollar of his claim against them.

That they requested him to sue such third persons, and he did so and failed and was compelled to pay costs and expenses, because whatever moneys had been in their hands had been paid out under the direction of Drew, McLane and Young.

4 That plaintiff's claim to the sum of \$250 he did not assign to Churchill, but it was reserved to him as an additional inducement to assign his claim against the other defendants. That said sum had never been received by plaintiff; and Drew, Young and McLane were now indebted to him therefor.

WHEREFORE, plaintiff demanded judgment for the amount of the claim he had assigned, less the 25 per cent paid by Churchill; for the costs and disbursements of his suit; that the assignment be adjudged void; and also for damages against Drew and Churchill for fraud and deceit.

5 The defendant Drew demurred to the complaint on the grounds (among others):

"That several causes of action have been improperly united in said complaint, viz.: That the first count or claim in said complaint being founded in fraud and based on allegations of fraud and being in the nature of a tort or wrong, and the second count or claim being upon contract, the two are inconsistent with each other."

6 ". . . that said second cause of action, count or claim so set forth in said complaint does not affect all of the parties to the said action, viz.: the said defendant Churchill.

The Supreme Court at Special Term overruled the demurrer, holding that (as to the objection that causes of action for tort and on contract were improperly united), the first cause of action was not for a tort, but to set aside an agreement on the ground of fraud; that the second cause of action was on an alleged contract, and that legal and equitable causes may be joined in the same action; and (as to the objection that the

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second cause of action did not affect the defendant Churchill), the defendant Drew, the demurrant, cannot take this objection. 7

The General Term reversed the decision of the court below, and sustained the demurrer, on the ground that, while taking the most favorable view for the plaintiff of the first causes of action and assuming that it is for the recovery of the amount unpaid upon the contract and that the remainder of the count is framed with a view of setting aside an impediment in the way of obtaining that relief, yet in the first count the defendant Drew is sought to be charged as a joint contractor with the defendants Young and McLane, and in the second count as a joint contractor with Young alone. The two contracts not being made by the same parties, cannot be sued on in one action. (Reported in 19 Hun, 490.) 8

The General Term granted a motion by plaintiff for re-argument on the ground that the attention of the court not having been called to Code Civ. Pro., § 490, defining the grounds of demurrer, the question whether the specifications in the demurrer were insufficient to raise the point upon which the case was decided, was overlooked. (Reported in 21 Hun, 109.) 9

The General Term on the re-argument adhered to their decision reversing the judgment and order of Special Term, and ordered judgment for defendant Drew, on the demurrer, with costs of the demurrer and the appeal, with leave to the plaintiff to amend his complaint in twenty days on payment of costs, holding that there was an improper joinder of causes of action, the first count being in tort and the second on contract, and the defect being specified in the demurrer. 10

The Court of Appeals affirmed the judgment.

FINCH, J. The demurrer interposed took the specific objection that the first cause of action pleaded was in tort, while the second was on contract, and so there was a misjoinder of causes of action. The General Term sustained the objection. It is now claimed that both counts were on contract, and the first is construed to allege a debt against Drew, McLane and Young, which is sought to be recovered, while Churchill is introduced as a

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11 party, and his and Drew's fraud alleged, solely to set aside the assignment to Churchill, and restore the plaintiff to the position of a creditor of the firm. But the pleading plainly avers a fraud perpetrated by Drew and Churchill, whereby the plaintiff suffered damage to the amount of seventy-five per cent. of his debt. The loss of the debt as damages suffered, and not its recovery upon the contract, is the substance of the pleading.

But if this were doubtful, and the first cause of action could be deemed *ex contractu*, and aimed solely at a recovery of the debt, a difficulty remains. An objection was stated in the demurrer that the second cause of action did not affect the defendant Churchill. Although it repeats the allegations of the first count, it goes on to show, and does clearly show, that Churchill was in no manner affected by it; for it avers that the moneys said to be in the hands of Saunders were not included in the assignment to Churchill, but reserved therefrom, and that the false statement of moneys in the hands of Saunders, and their assignment to plaintiff was before the latter's assignment to Churchill. Now the only pretense for making Churchill a party, upon the theory that both causes of action are on contract, is to set aside the assignment to him. But the Saunders money, or so much of the debt of the firm as that represented, is distinctly averred not to have been assigned to him, so that, taking as true, as we are bound to do, the allegations of the complaint, it distinctly appears that to the second cause of action Churchill was an entire stranger, and in no manner affected by it. The Code provides (§ 484) for the joinder of causes of action, naming in nine subdivisions those which may be united, but applying further to those in each class the limitations that they must be consistent with each other, and, except as provided by law, must affect all the parties. The exception mainly relates to mortgage foreclosures, as to which special provisions exist. The answer made to this difficulty is that no demurrer lies for making too many parties, and for such excess the party against whom a good cause of action is pleaded cannot demur. But the objection is not for a misjoinder of parties. It is for a misjoinder of causes of action. Those arising on contract and affecting all the parties may be joined. Those arising on contract, but inconsistent with

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each other, or not affecting all the parties, cannot be joined, and 15
the defect may be reached by demurrer. The General Term
was, therefore, right in its conclusion.

We are at liberty to allow the plaintiff to plead anew or
amend upon such terms as are just, or if need be, to direct a sev-
erance of the action. (Code, § 497.) No necessity for such
severance is suggested, but it seems proper to allow the plaintiff
to amend upon terms which are just.

The judgment of the General Term should be affirmed, with
leave to the plaintiff to serve an amended complaint within
twenty days from notice of the entry of this judgment, upon 16
payment, within the same time, of costs from the service of the
demurrer, including those on appeal to the General Term and
to this court.

All concurred.

Judgment accordingly.

Victory Webb Printing Co. v. Beecher, 26 Hun, 48.

VICTORY WEBB PRINTING, ETC., CO. v. BEECHER.

New York Supreme Court, First Department, 1881.

[Reported in 26 Hun, 48; aff'd in 97 N. Y., 651.]

1. Where a complaint contains separate statements of several supposed causes of action, each must be complete and sufficient in itself. A general statement after the end of the last cause of action of a fact essential to make each of them sufficient, but in no wise expressly referred to in any of them, does not avail to aid any of them.
 2. Each such incomplete cause of action is bad on a demurrer thereto.
 3. A demurrer to the whole of a complaint as a whole is not sustainable if it contains more than one cause of action, and any one is good.
- 1 Action against trustees of a manufacturing company to recover on their individual liability for a claim against the company, because of the alleged failure of the trustees to make and file an annual report.
- The complaint contained, in form, seven distinct counts, or causes of action, expressly stated to be separate causes of action; but each of several alleged as its foundation the violation of one and the same contract made by the said company, and only set forth some special item of damage consequent upon such
- 2 breach.
- A general clause, introduced at the end of the last count, and in express terms made applicable to all of them, set out a default made by the trustees in filing the required statement, and that they became thereby personally responsible for the debts of the company before mentioned.
- The first count or cause of action stated a contract for the construction of a machine, for which the price was due.
- 3 The second was for the wages of a superintendent sent to put it up.
- The third for freight advanced in sending it.
- Others were for duties, for cartage, for storage after refusal to accept it, and for insurance paid.
- After the seventh of these statements of supposed causes of action the complaint contained a paragraph alleging that the defendants were trustees of the company during a specified period, and neglected, etc., to make and file an annual report as

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required by the act referred to: "And the plaintiffs insist that 4
by virtue of the provisions of said act the defendants have
become jointly and severally responsible for the several sums
due to the plaintiffs as above set forth in the preceding seven
counts of this complaint, to each one of which this allegation is
intended to apply as forming part thereof."

"WHEREFORE, the plaintiffs demand judgment against the
defendants for the following, to wit. [*Here followed an enumer-*
ation of the amounts claimed on the respective counts.]

The *demurrer* was framed as follows:

5

I. The defendants [*names*] demur to the first alleged cause of
action set forth in the amended complaint upon the ground that
as it appears upon the face thereof, the same does not state facts
sufficient to constitute a cause of action.

II. The said defendants demur to the second alleged cause of
action set forth in the said amended complaint upon the ground,
that as it appears upon the face thereof, the same does not state
facts sufficient to constitute a cause of action.

[*A demurrer to each of the other five counts was couched in 6*
the same language.]

The Supreme Court at Special Term overruled the demurrer,
holding that the general allegation in or after the seventh count
rendered that good and also rendered the six preceding counts
good.

The General Term reversed the judgment and sustained the
demurrer.

DAVIS, P. J. The complaint sets forth several distinct causes 7
of action, some of which are alleged to have arisen upon a
contract for the manufacture of certain machinery; others upon
the manufacture of additions to the machinery not called for by
the original contract; others for claims growing out of the
unlawful neglect and refusal of the contracting corporation to
accept such machinery by reason of which divers expenses were
incurred for storage, insurance, etc., of the same. The original
contract was alleged to have been made with a corporation
organized by the name of "The Christian Union Company,"

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8 which corporation expired by the limitation of its charter before any cause of action arose on the contract, and it is alleged that a new corporation was thereafter organized having the same corporate name, which assumed the obligations of the contract and took the place of the former corporation in respect thereto. The action is brought against the appellants as trustees of the latter corporation to recover against them jointly and severally under the provisions of section 12 of the manufacturing act of 1848.

9 It is necessary, therefore, to import an averment on that subject which follows the seventh count or cause of action of the complaint, into each of the several preceding causes of action, to make them respectively causes of action against the defendants as such trustees.

It seems impossible to treat the complaint as containing a single cause of action. By its express allegations it contains several; and if it be true that the separation of them was not in all cases necessary, yet, as to some portions it certainly was, and the plaintiff ought not to be heard now to urge his own
10 inaccuracy in making the separations as a ground for defeating a demurrer which adopts and follows its own division and classifications. This suggestion is only made to meet the point now urged, that the demurrer is bad, because not taken to the complaint as a whole instead of to the several alleged distinct and separate causes of action. A demurrer to the whole complaint as a single cause of action would have been bad if either of the plaintiff's alleged grounds of action presented a separate cause.

11 [The merits were then considered, and the demurrer sustained.]

BRADY and DANIELS, JJ., concurred.

The Court of Appeals affirmed the decision of the General Term, without, however, discussing the question of pleading.

NOTE.—A failure to comply with § 483 Code Civ. Pro., requiring causes of action to be separately stated and numbered, does not render the complaint demurrable; the objection must be taken by motion.

Freer v. Denton, 61 N. Y., 492.

Gunn v. Fellows, 41 Hun, 257.

Marie v. Garrison, 83 N. Y., 14.

MARIE v. GARRISON.

New York Court of Appeals, 1880.

[Reported in 83 N. Y., 14; rev'g 45 Super. Ct. (J. & S.), 157.]

1. Special demurrers as used at common law are not used under the Code; and no pleading is demurrable unless subject to an objection specified in the section defining the grounds of demurrer.
2. A demurrer to a complaint for insufficiency can only be sustained when it appears that, admitting all the facts alleged, it presents no cause of action whatever. It is not ground of demurrer that the facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that the material facts are only argumentatively averred.
3. A complaint is deemed, on demurrer, to allege what can be implied from the allegations therein, by reasonable and fair intendment; and facts impliedly averred are traversable in the same manner as though directly averred.
4. It is sufficient that the requisite allegations can be fairly gathered from all the averments in the complaint, though the statement of them may be argumentative, and the complaint deficient in technical language.
5. When a defendant has actually received the consideration of an agreement, by a voluntary performance of an act by the other party, upon defendant's proposition or suggestion, such performance constitutes a consideration which will uphold the defendant's promise.
6. An agreement—between stockholders who were defending an action to foreclose a mortgage on a railroad, on the ground of the fraudulent issue of the bonds secured by it and the plaintiff—that the former should cease defence, and that the latter should procure a decree, and purchase at the sale, for their benefit,—*Held*, not illegal as involving collusion to enforce an illegal debt against the company. Stockholders, having an interest in the property about to be sold at public or judicial sale, may with honest motives for the purpose of preserving their interests, agree to combine or not bid against one of their number even though this may incidentally restrict competition upon such sale.
7. An allegation of defendant's refusal to exchange as agreed,—*Held*, on demurrer, to import a tender or offer by plaintiff of the thing he was to give in exchange.
8. If persons having several interests in property, enter into a joint contract with another person in reference thereto, they may be joined as plaintiffs in an action upon the contract, although their interests are several in respect to the property.
9. An allegation in a complaint that plaintiffs hold certain stock either in their own right or in trust,—*Held*, simply an averment of legal title,

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which was sufficient on demurrer, in an action on a contract in reference thereto, and that it did not import a misjoinder.

10. The contract being with plaintiffs as individuals, their action may be maintained in their own names, without setting out the trusts or referring to their character as trustees.

1 Action for breach of contract.

Peter Marie and others sued Cornelius K. Garrison (joining John T. Denny as a co-defendant) for breach of contract in regard to the reorganization of a railroad company.

- 2 Plaintiffs claimed that they had held in their own right and in trust for others a large quantity of stock. That Garrison, holding a majority of the third mortgage bonds, brought foreclosure, which some of the plaintiffs and others defended, alleging the
 2 invalidity of the bonds. That defendant, as plaintiff in the foreclosure, induced the present plaintiffs to cease defence by giving them the option of taking his place as purchaser if he should purchase at the sale; and subsequently they modified this agreement so that he should purchase absolutely, reorganize the company and give them a specified quantity of the new stock. But that Garrison caused a third person to purchase and then effected a reorganization and refused to give the stock.

- 3 The allegation of the amended complaint as to the relation of the plaintiff to the cause of action was:

- “ 1st. That the plaintiffs above named and the defendant, John T. Denny, at the several times hereinafter mentioned, owned and held, either in their own right or in trust for others, with full power of disposition as hereinafter related, thirty-six thousand shares of the capital stock of the Pacific Railroad of Missouri (a corporation duly created and organized under and by virtue of the laws of the State of Missouri) of \$100 each, amounting in the
 4 aggregate to the sum of \$3,600,000, at the par value of said stock.”

It appeared by other allegations unnecessary to recite here, that the alleged contract was made with the plaintiff and Denny jointly.

The allegation of performance on plaintiffs' part was:

“ The plaintiffs aver that they and the defendant Denny performed and fulfilled all the preliminary obligations in the said

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agreement contained and agreed to be performed on their part 5
and behalf; and in consequence thereof said defendant, Garrison,
was enabled to procure a judgment and decree of foreclosure,"
etc., etc.

The closing allegation of the amended complaint was:

"That the defendant John T. Denny refuses his consent to
be joined as a plaintiff, and he is therefore made a party defend-
ant in this action."

The defendant Garrison demurred on these grounds:

I. That the complaint did not state facts sufficient to consti- 6
tute a cause of action against the defendant.

II. That it did not appear from the complaint that the plaint-
iffs, or either of them, have the legal capacity to sue this
defendant, inasmuch as there is no averment showing whether
they sued in their own right or in trust for others, nor any
authority for suing in trust for others, nor any specific interest
in plaintiffs.

III. That there was a misjoinder of parties plaintiffs, as it did
not appear that plaintiffs had any joint cause of action, or any
right to unite or anything to authorize the joining of Jacob 7
Cromwell as a plaintiff.

IV. That there was a defect of parties plaintiff, as, should the
complaint be construed as showing that persons other than the
plaintiffs and Denny were interested or beneficiaries, then such
others were necessary parties plaintiff.

The New York Superior Court at Special Term (SPENCER, J.)
overruled the demurrer, holding (1) that the setting forth
several grounds of action on either of which defendant would be 8
liable, is not necessarily stating several causes of action; here
the "subject matter" of the action is the contract, and the
"cause of action" is the breach. The common law rules of
pleading applicable to a special count are applicable under the
Code, viz., that facts, not inferences or evidence, are required,
and that a demurrer lies only where defects so substantial and
fatal are presented as to authorize saying that, taking all the
facts to be admitted, they furnish no cause of action whatever.
That a general allegation of performance of conditions precedent

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9 is good by § 533, and the allegation that defendant refused to fulfill his said contract and agreement showed a breach, dispensed with tender of performance even of a condition precedent, and gave an immediate right of action.

(2) That want of legal capacity to sue, in the Code grounds of demurrer, does not include the objection that a plaintiff who, as a natural person, is presumed to have capacity to sue, is not the proper plaintiff to sue on this cause of action.

10 (3) That no misjoinder of plaintiffs appeared, because whenever an obligation is undertaken by two or more, or a right given to two or more without words of severance, it is the general presumption of law that it is a joint obligation or right.*

(4) There was no defect of parties plaintiff, for plaintiffs were trustees of an express trust within Code Civ. Pro., § 449.

The General Term reversed the judgment, holding that the complaint did not allege a breach; that the complaint had no allegation of the essential fact, that the plaintiffs were ready and able to tender, and did tender, performance on their part; nor of
11 any excuse for not tendering.

The Court of Appeals reversed this judgment.

ANDREWS, J. Special demurrers, as known to the former practice have no place in our present system of pleading. The Code authorizes a demurrer for specific causes, and no pleading is demurrable unless it is subject to one or more of the objections specified in the section defining the grounds of demurrer. A demurrer to a complaint for insufficiency can only be sustained when it appears that, admitting all the facts alleged, it presents
12 no cause of action whatever. It is not sufficient that the facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that the material facts are only argumentatively averred. The complaint on demurrer is deemed to allege what can be implied from the allegations therein, by reasonable and fair intendment, and facts impliedly averred are traversable in the same manner as though directly averred (1

* Otherwise by statute, of instruments creating or transferring estates in land. 1 R. S., 727, § 44. Same Stat., 4 R. S. [8 ed.], 2495, § 44.

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Chitty's Pl., 713; Haight v. Holly, 3 Wend., 258; Prindle v. 13
Caruthers, 15 N. Y., 425). The remedy for indefiniteness is not
by demurrer, but by motion (Code, § 546; Seely v. Engell, 13
N. Y., 542). "Indefiniteness," says Chitty, "is in general only
matter of form" (1 Chitty's Pl., 717). The rule by which,
under the Code, the sufficiency of a complaint is to be deter-
mined is stated by DENIO, J., in Zabriskie v. Smith (13 N. Y.,
330). He says: "It is sufficient that the requisite allegations
can be fairly gathered from all the averments in the complaint,
though the statement of them may be argumentative, and the
complaint deficient in technical language." 14

In the light of these rules we proceed to examine the question
whether the complaint in this case sets forth a cause of action.
It is undoubtedly essential, to sustain the complaint, that it
should appear therein that a valid contract was entered into by
Garrison, from the breach of which a right of action has accrued
to the plaintiffs and Denny. It is insisted on the part of Garrison
that the promise upon which the action is based is, so far as the
complaint shows, a mere *nudum pactum*, no valid consideration
therefor being averred. The oral agreement of June, 1876, upon 15
which the action is brought, is alleged to have been made in
consideration of the surrender by the plaintiffs and Denny to the
defendant Garrison, of the letter of March 29, 1876, and of their
consenting to a modification of the terms of the agreement con-
tained therein, and no other consideration is averred or can be
gathered from the terms of the substituted agreement. If the
contract surrendered was itself a *nude pact*, its surrender formed
no valid or legal consideration for the substituted promise. If,
on the other hand, it was binding and valid, it needs no citation
of authorities to show that its surrender was in law a good con- 16
sideration for the new agreement.

Does, then, the complaint show, either directly or by fair
inference, a valid consideration for the conditional promise of
the defendant Garrison, contained in the letter? No considera-
tion appears in the letter itself. It shows in general terms the
situation of the Pacific Railroad Company and the relation of
the parties to it; that Garrison was the owner of a majority in
amount of the third mortgage bonds of the road, and that the

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17 parties to whom the letter was addressed were stockholders therein, and that a foreclosure action to foreclose the third mortgage was pending at the suit of one Ketcham. The letter contains, in substance, a promise by Garrison that if he should purchase the road on the foreclosure, he would, upon the plaintiffs organizing a successor company within six months after the purchase and making the payments and complying with the other conditions specified, convey the road to them. He does not bind himself to purchase, but in the event that he does purchase, his undertaking to convey the road on the terms stated is absolute. In substance, Garrison agreed, in case he purchased the road, to give the plaintiffs the option to take it upon the terms proposed at any time within six months after such purchase.

18 The complaint in its introductory averments sets forth that the plaintiffs and Denny "owned and held, either in their own right or in trust for others with full power of disposition," thirty-six thousand shares of the capital stock of the Pacific Railroad, of Missouri, of the aggregate par value of \$3,600,000; that the defendant held \$2,200,000 of the \$4,000,000 issue of third mortgage bonds, which it is alleged were of doubtful validity, and were claimed by the stockholders to have been fraudulently and collusively issued by the directors of the company, and without the consent of the stockholders, as required by the laws of Missouri; that the defendant was solicitous to have the bonds adjudicated to be valid, and that a collusive foreclosure suit, in the interest of Garrison and others, was commenced by Ketcham in November, 1875, to foreclose the third mortgage, and was pending, in which suit the defendant had in April, 1876, been admitted as co-complainant, and had become the principal party in prosecuting the same; that certain stockholders had intervened in the suit and filed an answer and crossbill, alleging collusion and fraud on the part of directors of the road in the issue of the bonds; that some of the plaintiffs had filed a petition in the foreclosure suit to be made parties, and to be allowed to defend the same in their own behalf, and in behalf of other stockholders; that the value of the equity of redemption in the road was \$8,000,000. Following these introductory averments of the complaint, are paragraphs five and six, upon which the plaintiffs rely

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as containing an averment of a consideration for the defendant's 21
promise contained in the letter, as follows :

"*Fifth.*—That on or about the 29th day of March, 1876, with the view of compromising said conflicting claims and establishing the validity of said debt of \$4,000,000 in the hands of said Garrison (the defendant Garrison) and others of his associate bondholders, and to prevent the plaintiffs from defending said foreclosure suit, and in consideration of the relinquishment by the plaintiffs of all further opposition to said foreclosure suit, the said Garrison, the defendant, entered into an agreement with plaintiffs evidenced in part by a letter written by him to some of 22
the plaintiffs and the defendant Denny, a copy of which is hereto attached, marked "A," and the same is made a part of this complaint.

"*Sixth.*—The plaintiffs aver that they and the defendant Denny, performed and fulfilled all of the preliminary obligations in the said agreement contained and agreed to be performed on their part and behalf, and in consequence thereof said defendant Garrison was enabled to procure a judgment and decree of foreclosure on or about June 6, 1876, and a sale of said premises on 23
or about the 6th day of September, 1876, which sale was confirmed by the court in the month of October, 1876, viz., October 6, which confirmation was modified October 23, 1876."

It is not averred that the plaintiffs and Denny agreed to relinquish their opposition to the foreclosure in consideration of the agreement of Garrison contained in the letter. But the averments contained in the paragraphs quoted do fairly import that in consequence of their relinquishment of such opposition the defendant Garrison was enabled to procure a judgment of 24
foreclosure and sale, and it is averred in a subsequent part of the complaint that without their "co-operation and consent a decree of foreclosure and sale would not then have been made, or made at all until after a trial by the court, the result of which trial was in doubt." It is not essential to the existence of a consideration for the defendant Garrison's agreement, that mutuality of obligation should have existed between the parties when his agreement was made. The necessary consideration would arise if the plaintiffs and Denny, in compliance with the proposition

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25 in his letter and in consideration of his promise therein, did in fact discontinue their opposition to the foreclosure, although they did not at the time bind themselves to do so. When a defendant has actually received the consideration of an agreement by a voluntary performance of an act by the other party, upon his proposition or suggestion, such performance constitutes a consideration which will uphold the defendant's promise. (*Sands v. Crooke*, 46 N. Y., 564; *Morton v. Burn*, 7 Ad. & El., 25; *Storm v. U. S.*, 94 U. S., 83.) The fair intendment from the allegations of the complaint is that Garrison undertook to do the things
26 promised in his letter, in case the plaintiffs would relinquish the opposition to the foreclosure, and that they did subsequently relinquish their opposition, thereby enabling him to secure judgment of foreclosure. In this view we think the complaint sufficiently averred a consideration for his original promise, and that the surrender of the option to purchase the road, in case it should be bid off by Garrison, was a good consideration for the substituted oral agreement.

By the substituted agreement, Garrison agreed to bid off the
27 road on the foreclosure sale and organize a successor company, upon a basis stated in the complaint, and "deliver to said plaintiffs and said Denny, in return for the amount of the stock of the Pacific Railroad, so as aforesaid held by them, thirty-six thousand full-paid shares of the par value of one hundred dollars each" in the new organization.

It is claimed that this agreement was illegal on two grounds: First, that it was a collusive arrangement between the parties to establish a fraudulent and invalid debt, and procure a sale of the property of the company thereon, to the prejudice of the other
28 stockholders and creditors; and second, that the agreement was calculated to prevent competitive bidding between the parties on the foreclosure sale, contrary to the general principles and policy of the law.

We think that neither of these points is well taken. The complaint does not allege that the third mortgage bonds were in fact fraudulent. It alleges that they were of doubtful validity, and then proceeds to specify various particulars in respect to which it was claimed that they were invalid as before stated. It

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is not alleged that Garrison was a party to the fraud, if any existed, in the issue of the bonds, or that the company did not receive their full value, or that they were not given to secure a valid debt; nor does it appear that the mortgage debt could not have been enforced in equity against the property of the company. The allegations of the complaint do not justify the inference that the parties were colluding to enforce a fictitious debt against the company, and it is difficult to see what interest the plaintiffs could have had to have united in such a conspiracy.

In respect to the second ground of alleged illegality it is to be observed that the magnitude of the property involved in the foreclosure would naturally prevent an individual (unless possessed of great wealth) from bidding on the sale. The plaintiffs, who together owned a large number of shares, had a right to enter into any arrangement for the protection of their interest not prohibited by law. This was not the case of a combination between persons having no prior interest in the property to suppress bidding at a judicial sale for speculative purposes. The arrangement made was, so far as appears, a reasonable and honest attempt on the part of the plaintiffs, to save their property from being sacrificed on the foreclosure. The other stockholders and bondholders were at liberty to bid on the sale. The mere fact that an arrangement fairly entered into, with honest motives, for the preservation of existing rights and property, may incidentally restrict competition at a public or judicial sale, does not, we think, render the arrangement illegal. The question of intent, at all events, is one for the jury, upon the whole facts as they shall appear on the trial. (*Marsh v. Russell*, 66 N. Y., 288; *Phippen v. Stickney*, 3 Metc., 384; *Wicker v. Hop-*
pock, 6 Wall., 94.)

The complaint shows that the road on the foreclosure sale was purchased for the defendant Garrison in the name of a third party, and that he subsequently organized a new company. The complaint then alleges, "that although often requested so to do, the said Garrison has refused and does refuse to fulfill his said contract with the plaintiffs, and to issue or to cause to be issued and be delivered to the plaintiffs thirty-six thousand shares of stock in said (new) company, in exchange for the stock of the

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83 Pacific Railroad, so as aforesaid held by the plaintiffs." It is claimed that the complaint is defective, for the reason that it shows no offer, readiness or even ability to surrender the thirty-six thousand shares of old stock in exchange for the new shares. This objection is unanswerable, unless a tender of the old shares is implied in the averment of the refusal of Garrison to issue the new shares in exchange for the stock of the old company held by the plaintiffs. Bearing in mind that what is implied in an averment is on demurrer to be taken as if the thing implied is directly averred, and that an argumentative pleading is not
34 for that reason demurrable, we conclude, although not without some hesitation, that an averment of a refusal to exchange does import that the other party offered to do that without which no exchange could be affected, viz., that he tendered the property or thing which was the consideration of that which he was to receive, and which he called on the other party to deliver.

It is made a separate ground of demurrer that there is a misjoinder of parties plaintiffs. This is one of the grounds of demurrer under the new Code (§ 448). This objection is predi-
35 cated in part upon the general rule that parties whose interests are divided, distinct and several, cannot unite as plaintiffs, and it is asserted that the interests of the plaintiffs under the contract sued upon were several and distinct within the rule stated.

We concur in the view of the defendant's counsel that the rational construction of the pleader's allegation in the introductory clause of the complaint, that the plaintiffs and Denny "owned and held, either in their own right or in trust for others," the thirty-six thousand shares, etc., is that they held shares distributively and severally aggregating that number,
36 one or more holding their shares individually, and one or more holding shares in trust, or that one or more, or each, held shares both individually and in trust. But we think it does not follow from the individual or several ownership by the plaintiffs of the shares in the old company, that their interest in the contract with Garrison was several and not joint, or that Garrison's contract was with the plaintiffs severally and distributively.

There seems to be no difficulty, in the nature of things, in the plaintiffs, as owners of distinct and several shares of stock in the

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same company, uniting and combining their shares in one aggregate for the purpose of sale as an entire property to one person, and taking from him a promise to pay them jointly a gross sum equal to their aggregate interests, leaving them, as between themselves, to arrange the distribution of the fund which shall be derived from the sale. The circumstances of this case show that such an arrangement may be of great practical convenience, and we know of no peremptory rule of law which forbids it. The promise of Garrison was, in form, a promise to the plaintiffs jointly. He entered into no undertaking to transfer to each plaintiff shares corresponding with the shares held by him in the old company. His promise was on receiving them from the plaintiffs, as an aggregation of individuals, thirty-six thousand shares, to give them in exchange thirty-six thousand other shares. The shares to be transferred by them to Garrison, and by Garrison to the plaintiffs, were to be transferred *in solido*. The legal interest of the plaintiffs in the contract was joint, although their interest in the shares to be transferred by Garrison or in the damage which may be recovered may be unequal and separable. The construction of the contract is, we think, precisely the same as if the plaintiffs had been joint owners of the shares when the contract was made. (See *Emery v. Hitchcock*, 12 Wend., 156; *Loomis v. Brown*, 16 Barb., 331; 1 Pars. on Cont., 19, and cases in note.) 37 38 39

It is also claimed that there is a misjoinder of causes of action in behalf of trustees, with causes of action in favor of individuals, and also that the complaint is defective in not setting forth the trust under which the trust shares were held. But the averment in the complaint that the shares were held by the plaintiffs either in their own right or in trust, is an averment simply of legal title of the plaintiffs to the shares mentioned. The action is not an action by trustees to enforce a trust, or upon a contract made by the plaintiffs in a representative character. The contract is with the plaintiffs as individuals, and we are of opinion that an action may be maintained thereon by them in their own names, without setting out the trust or referring to their character as trustees. At least it cannot appear on demurrer that the plaintiffs are not entitled to maintain the action in their individ- 40

Johnson v. Golder, 132 N. Y., 116.

41 ual capacity. (See *Merritt v. Seaman*, 6 N. Y., 168; *Mellen v. Hamilton F. Ins. Co.*, 17 *id.*, 615; 1 Chitty's Pl., 3.)

Our conclusion is that the demurrer was properly overruled at the Special Term. It must be admitted that the complaint is indefinite and argumentative, and that material facts are obscurely averred, but we think that it is not defective in substance within the rules by which the sufficiency of pleadings on demurrer is tested.

42 The judgment of the General Term should be reversed and the judgment of the Special Term affirmed, with leave to the defendant to answer on payment of costs.

All concurred, except FINCH, J., taking no part.

Judgment accordingly.

JOHNSON v. GOLDER.

New York Court of Appeals, Second Division, 1892.

[Reported in 132 N. Y., 116.]

1. A demurrer will not be sustained if the reasonable and fair inferences which can be drawn from the allegations of the pleading demurred to, make out a case.
2. Thus, from an averment of the death of J. in 1880, leaving a last will and testament which was duly probated February 13, 1880, the court will infer in support of the complaint that J. died before such probate.
3. *It seems*, that if a more precise statement was desired, the defendant should have moved that the complaint in this particular be made more definite and certain.

1 Demurrer to complaint for insufficiency.

The Special and General Terms of the City Court of Brooklyn sustained the demurrer without passing, however, upon the point presented in the opinion of the Court of Appeals.

The Court of Appeals reversed the judgment.

FOLLETT, Ch. J. It is urged in behalf of the demurrant that it does not appear upon the face of the complaint that James M. Johnson was the owner of the fee of the mortgaged premises and a necessary party to the action begun by Bates, May 19, 1880, to foreclose

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the first mortgage, because it is said that it is not alleged that 2
 Nanette Pontau Johnson was then dead. It is averred in the 9th
 subdivision of the complaint that she died in 1880, leaving a last
 will and testament, which was duly probated February 13, 1880,
 under which James M. Johnson, as it is alleged, acquired the fee
 of the land, subject to the amount due upon the mortgage of
 April 27, 1854, foreclosed by Bates. The death of Mrs. Johnson
 in 1880, is alleged in positive terms, and the only inference
 which can be drawn from the averment that the will was pro- 3
 bated prior to the date when the first foreclosure action was be-
 gun, is that the testatrix died before that time, and this is the
 reasonable and fair inference to be inferred from the allegation.
 This alleged defect would have been barely a sufficient ground
 to support a special demurrer under the practice existing prior
 to the Codes, but under the present practice, if a more precise
 statement was desired, the defendant should have moved that
 the complaint in this particular be made more definite and cer-
 tain. (*Marie v. Garrison*, 83 N. Y., 14; *Lorillard v. Clyde*, 86
id., 384; *Milliken v. Western U. T. Co.*, 110 *id.*, 403.)

[*A ruling on another question is here omitted.*] 4

All the judges concurred.

Judgment reversed.

MASTERSON *v.* TOWNSHEND.

New York Court of Appeals, 1890.

[Reported in 123 N. Y., 458.]

1. A demurrer does not admit a legal conclusion, nor the adversary's ✓
 interpretation of a document pleaded by him, but only such relevant
 facts as are well pleaded.
2. In order that the complaint in ejectment show plaintiff's right to the
 possession of the premises in question and to the relief demanded, it
 must disclose, on its face, such a state of facts that their admission
 by a demurrer would leave but the legal conclusion to be drawn in his
 favor.
3. In the construction of a testamentary disposition, where the language
 is unskillful, or inaccurate, but the intent can be clearly collected from
 the writing, it is the duty of the court to give effect to that intent,
 subject only to the proviso that no rule of law is thereby violated.

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4. This rule *applied*, holding that a testamentary provision, stated at length in the complaint, contained a devise by implication to P.; and that it was error to overrule a demurrer to plaintiff's complaint wherein he alleged a failure to devise and a reversion to himself as heir at law, under such testamentary provision.

- 1 Action of ejectment. Demurrer for insufficiency. The facts necessary to the decision fully appear in the opinion.

At the Special and General Terms of the Superior Court, the complaint was held sufficient.

The Court of Appeals reversed the judgment.

- GRAY, J. In order that plaintiff's right to the possession of the premises in question and to the relief he demands shall
- 2 appear well founded in law, his complaint must disclose, on its face, such a state of facts as that their admission by the defendant's demurrer would leave but the legal conclusion to be drawn in his favor. For some undisclosed reason, the case below was treated and disposed of as though by the demurrer the allegations of the complaint, as to the legal conclusion of a title and interest in the plaintiff, were substantially admitted, and the testamentary devise, which lies at the foundation of plaintiff's
- 3 claim of title, apparently went without interpretation, or consideration. To the defendant's contention here, that the heirs at law of testator have taken no title under the devise in question, the plaintiff replies that they are precluded from occupying that position, inasmuch as "all the allegations of the complaint are admitted by the demurrer." Of course, there is nothing in such a reply, for by the demurrer no admission is made save as to such relevant facts as were well pleaded. There could be no
- 4 admission by that pleading of any legal conclusions, or of any interpretation placed by the plaintiff upon the devise.

The question, therefore, presents itself as to what was the effect of the devise upon the title to the real estate of which the testator died seized.

The devise is stated at length in the complaint, in the following words:

"*Third.* I hereby devise and convey all my undivided one-half interest in the lot of land and appurtenances situate on the corner

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of Fifty-fourth street and Seventh avenue in the city of New York now owned by me and my brother, Peter Masterson, jointly in trust to my said executor to collect the rents, issues and profits of the same and pay over six hundred dollars thereof to my wife so long as she remains unmarried, and the balance of said rents and profits my executors shall pay to my said brother, Peter Masterson, but if, in the discretion of my said brother and my said executor, it should be deemed advisable to sell said real estate, then my said executor is hereby authorized to unite in a sale of said premises, and is hereby empowered to execute all needful conveyances for that purpose, and from the proceeds of such sale pay to my wife the sum of six hundred dollars annually as long as she remains unmarried, and upon her marriage, or death before marriage, then all of said proceeds are to be paid to my brother, Peter Masterson.”

As the widow has remarried, the argument of the plaintiff is that the trust created by the will thereupon ceased, and that there was no testamentary disposition made of this estate after the happening of that event. He claims, therefore, that it has reverted to the heirs of the testator, of whom he is one. In that view we are unable to agree with him.

This is a plain case of a devise by implication, whereby, upon the death of testator, his brother Peter became vested with the title to the real estate, subject, only, to the trust provision made for testator's widow. However incomplete the language to express the purpose of the testator, an intention and an understanding on his part are evident that his brother Peter should take, as devisee, the property which was the subject of disposition in that clause. What the testator has imperfectly done, by way of expression, is effectuated by the application of well known legal rules. In the construction of a testamentary disposition, where the language is unskillful, or inaccurate, but the intent can be clearly collected from the writing, it is the duty of the court to give effect to that intent, subject only to the proviso that no rule of law is thereby violated. (1 R. S. 748, § 2; *Purdy v. Hayt*, 92 N. Y., 454.) Courts have, from an early day, repeatedly upheld devises by implication, where no gift of the premises seems to have been made in the will, in formal language. (*Goodright v.*

Masterson v. Townshend, 123 N. Y., 458.

- 9 *Hoskins*, 9 East., 306; *Jackson v. Billinger*, 18 Johns., 368; *Matter of Vowers*, 113 N. Y., 569.)

They are justified in so doing whenever such a construction expresses what the testator manifestly intended to express. The presumption here of a devise to Peter by implication is so well founded, as to make it one which is free from doubt in the mind. The facts, which are disclosed to us, combine to raise it. There is the gift of all of the rents and the profits of the land to the testator's brother, after the widow's annuity is paid. There is a gift to the brother of all the proceeds of a sale of the property,
10 beyond what is required for the payment of the widow's annuity. Though testator left other brothers and sisters, there is no mention made of them. There is the further significant circumstance that some power over the disposition by sale of the land is given to Peter. It is true that it is an authority only to advise, or to consent in the execution of the power of sale by the executor; but when we consider that fact, in connection with the fact that a sale would result in vesting in him the proceeds beyond any
11 cavil and doubt, an inference arises, and one which seems irresistible to my mind, that the testator supposed it of no consequence to his brother's interests, whether the estate remained intact, or was converted into money. The case is one where the presumption is independent of conjecture. It rises beyond a mere surmise, for it is based on circumstances which leave no hesitation in the mind of the court as to what was the testator's purpose. The formal words of a devise to Peter may be absent, but it is perfectly clear that it was the intention to devise the land, and that would be consistent with the expressed gift of the proceeds of a sale. The rule of construction being satisfied by the
12 presence of the elements establishing a presumption, the courts must read into the clause a devise of the land to the brother, subject to the trust provision for the widow. The power of sale does not affect the question of Peter's rights, other than to emphasize them. In the event of its execution, the testator gives to Peter all of the proceeds of the sale, not required to pay to his wife \$600 annually during her life or widowhood. Nothing could more strongly evidence a condition of mind, in which the testator believed his brother Peter would receive all of the estate, subject

Smith v. Holmes, 19 N. Y., 271.

to the widow's provision, and whether it remained in the shape of realty, or was converted into money, than does this language of the clause.

The judgments recovered by the plaintiff should be reversed and a judgment entered dismissing his complaint, with costs.

All the judges concurred.

Judgment accordingly.

SMITH v. HOLMES.

New York Court of Appeals, 1853.

[Reported in 19 N. Y., 271.]

1. On demurrer the proof of service of summons is no part of the record, and cannot be referred to to fix the time of commencing the action in aid of a demurrer on the ground that it was prematurely brought. ✓
2. The objection that the action was premature, if it does not affirmatively appear on the face of the complaint, must be taken by answer.
3. A complaint which shows that something is due and payable is in that respect good as against demurrer for insufficiency.
4. Thus a complaint seeking to recover both principal and interest, which shows that interest is in default, is not demurrable although showing that the principal is not yet recoverable.

Action on a bond.

1

The complaint alleged with some detail that on February 15, 1853, the parties agreed upon the sale of a farm by plaintiff to defendant, possession to be given April 1, 1853; a specified sum to be paid in cash on or between May 6th to 10th, inclusive, at the time of which payment plaintiff was to give deed, and defendant to give a bond and purchase money mortgage, "payable in two years from the said 1st day of April, with annual interest." That pursuant to the agreement plaintiff gave possession and defendant made the part payment, and executed and delivered the bond and mortgage. The complaint then set out the bond, which was of a common form, dated May 10, 1853, and by the condition therein provided for the payment in these words: "The just and full sum of \$14,816.11 in two years from the first day of April last, with annual interest." 2

Smith v. Holmes, 19 N. Y., 271.

- 3 It concluded thus: "And the plaintiff further says that he is now the holder and owner of said bond and that the interest for one year is now justly due thereon, and that no part thereof has been paid.

WHEREUPON, the plaintiff demands judgment against the defendant for \$1,037 $\frac{1}{100}$ with interest from the first day of April, 1854."

The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

- Neither the summons, complaint nor demurrer were dated.
4 It appeared by the appeal book that the issue of law raised by the demurrer was tried in the Supreme Court June 12, 1854.

The Supreme Court overruled the demurrer.

The Court of Appeals affirmed the judgment.

- JOHNSON, Ch. J. Neither the summons nor complaint show when the action was commenced. The sheriff's certificate of the service of the summons is evidence of the fact, and of the time when the service was made; but it is not a part of the record
5 before the court upon demurrer. Indeed, it is not a necessary part of the record of judgment in any case where the defendant has answered the complaint (Code, §§ 281, 246), either by answer or demurrer. Under the former system of pleading, the declaration was always entitled of a term, or as of some particular day, and if from the declaration it appeared that the cause of action had not then accrued, it was good ground of demurrer. (*Maynard v. Talcott*, 11 Barb., 569.) But as no such title is now necessary a demurrer is not the mode of raising a question of that sort. If such an objection exists in any case, it
6 should be brought up by answer, and then it will be available to the party on the trial if the fact be made out.

The bond in this case is dated May 10, 1853, and is conditioned to be void if the obligor pay the sum therein mentioned "in two years from the first day of April [then] last, with annual interest." The demurrer was tried June 12, 1854. If, therefore, anything was due at that time on the bond, the plaintiff was entitled to judgment. The precise amount due was not brought in question by the demurrer; that only presents the inquiry whether any-

Nones v. Hope Mut. Life Ins. Co., 5 How. Pr., 96.

thing was due. Now, whether interest was to be computed 7
from May 10, 1853, or from the first day of April, 1853, it is
quite clear that the requirement of annual interest could not be
satisfied by the payment of principal and interest, when the
principal should become due.

The obvious import of the language employed is that an
annual payment of interest is to take place, and whether that
became due on the 1st of April, or the 10th of May, 1854, is
immaterial, as the case is here presented.

The judgment at General Term should, therefore, be affirmed. 8

All the judges concurred.

Judgment affirmed.

NONES v. THE HOPE MUTUAL LIFE INS. CO.

New York Supreme Court, General Term, 1850.

[Reported in 5 How. Pr., 96.]

1. *It seems*, the meaning of that clause of § 144 of the Code of Procedure
[Code Civ. Pro., § 488, subd. 1] giving the defendant the right to demur ✓
when it appears on the face of the complaint "that the court has not
jurisdiction of the person of the defendant" is, that the person is not
subject to the jurisdiction of the court, and not that the action has
not been regularly commenced.
2. If the action has not been regularly commenced, the defendant must
relieve himself from such irregularity by motion; on such fact being
made known to the court it will set aside all proceedings founded
upon such irregular service.*
3. An answer setting up that the summons has been irregularly served
upon defendant, a foreign corporation, presents no defense to the
complaint and will be stricken out on motion as frivolous.

EDWARDS, J. The defendant in this suit is a foreign corpora- 1
tion created by the law of the State of Connecticut—this fact is
set forth in the complaint.

It appears in the case that the defendant, after having given
notice of appearance and of the retainer of an attorney of this
court, put in an answer, in which it is alleged that the company
is a foreign corporation, and that this suit was commenced by a

* In some jurisdictions the objection may be taken by plea or answer.

Nones v. Hope Mut. Life Ins. Co., 5 How. Pr., 96.

- 2 summons and complaint served on the president of the company, in the city of New York, and not elsewhere; and that no other process had been served on the company, and that no warrant of attachment had been issued, or other proceedings taken against the company at the commencement of the suit; and that by reason thereof this court has not acquired jurisdiction over the defendant, and cannot take cognizance of the subject of this suit.

The question presented to us is whether the matter thus set up on the part of the defendant is a sufficient answer to the complaint.

- 3 It is provided by § 144 of the Code of Procedure [Code Civ. Pro., § 488] that the defendant may demur to the complaint when it shall appear upon the face thereof that the court has no *jurisdiction of the person* of the defendant. And by § 147 [Code Civ. Pro., § 498] it is provided that when such matter does not appear upon the face of the complaint, the objection may be taken by answer. [*The court then adverted to the question, whether under the peculiar provisions of the original "Code of Procedure," the summons was duly served*, and continued thus:*]

- 4 With the view which we have taken of the case, we do not consider it necessary to express any opinion upon this question; for, assuming that the service was irregular, it does not follow that the facts set up in the answer furnish a sufficient defence to the complaint.

- 5 It will be observed that the answer is founded upon that section of the Code which provides that where the court has no jurisdiction of the person of the defendant, the objection may be taken by answer, but the objection taken here is not that the court has no jurisdiction of the person of the defendant, but that the summons had been irregularly served. There is no question that this court has jurisdiction over a foreign as well as a domestic corporation. The statute expressly gives it, and declares how process may be served upon it. It is true, that in one sense the court never gets jurisdiction over a party, unless he is regularly served with process; that is, if process has been irregularly served, on that fact being made known to the court it will declare such service irregular, and will set aside all

* The point is now explicitly regulated by Code Civ. Pro., § 482.

Phoenix Bank v. Donnell, 40 N. Y., 410.

proceedings founded upon it. Thus, the Code provides in section 134, subd. 4, that in all other cases than those particularly mentioned therein, the summons shall be served by delivering a copy to the defendant personally. But suppose that in the case provided for in subd. 4, the copy of the summons instead of being served personally should be delivered at the defendant's house or left at his place of business, will it be contended that such fact could be set up in an answer by way of objection to the complaint on the ground that the court has no jurisdiction of the person? And yet that would be a case precisely analogous to the one before us. The meaning of the clause "that the court has no jurisdiction of the person" is, that the person is not *subject to the jurisdiction* of the court, and not that the suit has not been regularly commenced. If the suit has not been regularly commenced the defendant must relieve himself from such irregularity by motion.

With these views we are of opinion that the appeal should be dismissed; with leave, however, to the defendant to answer anew upon the merits within twenty days, upon payment of the costs and disbursements herein, subsequent to the answer.

PHOENIX BANK v. DONNELL.

New York Court of Appeals, 1869.

[Reported in 40 N. Y., 410; aff'g 41 Barb., 571.]

1. To sustain a demurrer on the ground that plaintiff has not legal capacity to sue, the want of capacity must affirmatively appear on the face of the complaint. The omission to allege plaintiff's incorporation does not sustain that ground of demurrer.*

* Whether this rule is now changed see *Code Civ. Pro.*, §§ 1775, 1776.

§ 1775. *Complaint in actions by or against corporations.* "In an action brought by or against a corporation, the complaint must aver that the plaintiff, or the defendant, as the case may be, is a corporation; must state whether it is a domestic corporation or a foreign corporation; and, if the latter, the state, country, or government, by or under whose laws it was created. But the plaintiff need not set forth, or specially refer to any act or proceeding by or under which the corporation was created."

§ 1776. *When proof of incorporation needed.* "In an action brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation."

See also the case following.

Phoenix Bank v. Donnell, 40 N. Y., 410.

2. In an action by a plaintiff, suing in a corporate name, demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, does not raise the objection that the plaintiff has not alleged the fact of its incorporation; for such an objection points to the capacity to sue, not to the cause of action.

1 The introduction of the complaint was :

"The Phoenix Bank of the city of New York, plaintiffs in the above-entitled action, respectfully show to the Supreme Court :"

[*The complaint then alleged the making of a promissory note by defendant, its subsequent indorsement by the payees named, and its delivery to plaintiffs. There was no averment of plaintiff's incorporation.*]

2 The defendant demurred, assigning as grounds :

1. That it appeared by the complaint that the plaintiff had not legal capacity to sue.

2. That it did not appear that the plaintiff was incorporated, and entitled to sue.

That the complaint did not state facts sufficient to constitute a cause of action.

3 *The Supreme Court at Special Term* (LEONARD, J.) overruled the demurrer and ordered judgment for the plaintiff with costs, with leave to the defendant to answer in ten days, on payment of costs.

Judgment was entered accordingly in favor of the plaintiff for \$1,865.93.

4 *The General Term* affirmed the judgment; holding that incapacity did not appear on the face of the complaint; that under the Revised Statutes then in force (2 R. S., 458, § 3) it was not necessary for a corporation plaintiff to prove the existence of such corporation unless the defendant shall have pleaded, in abatement or in bar, that the plaintiffs are not a corporation.

That the complaint need not aver any fact which it is unnecessary for the plaintiff to prove in order to maintain his action. An express allegation that the plaintiffs are not a corporation must be in the answer, in order to raise the question; the issue cannot be raised by a negative of the allegation in the complaint.

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The Court of Appeals affirmed the judgment. .

5

GROVER, J. Section 114 of the Code [of Procedure] provides that the defendant may demur to the complaint when it shall appear upon the face thereof that there is one or more of six specified defects therein. It is settled that these are the only grounds upon which a demurrer to the complaint can be sustained. . The counsel for the appellant relies in the present case upon the second and sixth—principally upon the second—for the reason that the complaint contains no allegation that the plaintiff is a corporation; insisting that unless it is such, it has no capacity to sue in that character.

6

In this position the counsel is correct; but does the argument show that the demurrer is well taken? All that the argument proves, is that the complaint does not show upon its face, affirmatively, that the plaintiff has capacity to sue. But to sustain the demurrer, the Code requires that it should appear upon its face that it had not such capacity, which in no respect appears. For aught appearing on the face of the complaint, the plaintiff may be a corporation entitled to sue, as such. § 147 provides, that when any of the matters enumerated in § 144 do not appear upon the face of the complaint, the objection may be taken by answer. This would seem to indicate the proper practice with sufficient clearness. If it appears upon the face of the complaint, that a plaintiff suing as a corporation is not such in fact, a demurrer is the proper remedy of the defendant under § 144. If the complaint does not show that the plaintiff is not a corporation on its face, the objection that it is not such must be taken by answer, under § 147. This would seem to render further discussion of the question unnecessary.

7

Upon looking into the authorities, some conflict will be found. The counsel for the appellant cites a number of cases, holding that allegations showing that plaintiff is a corporation are necessary in the complaint. Most of these are cases arising under the system of pleadings in use prior to the enactment of the Code. Under that system, although cases may be found intimating a contrary doctrine, yet the decided weight of authority is that such averments were necessary, and that the want thereof could be taken advantage of by demurrer. But these authorities have

8

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- 9 no application to the question under the Code. There are a few cases in which similar opinions have been expressed since the Code. (*Stoddard v. The Onondaga Annual Conference*, 12 Barb., 573; *Elizabethport Mfg. Co. v. Campbell*, 13 Abb., 86.) In some cases the contrary has been held. (*Union Ins. Co. v. Osgood*, 1 Duer, 107; *Kennedy v. Colton*, 28 Barb., 59.) In *Bank of Havanna v. Magee*, DENIO, J., in giving the opinion of the court, speaking of a complaint precisely like that in the present case in this respect, says: But there was not here any defect on the face of the complaint. For aught that appeared,
- 10 the plaintiff was a corporate body. This indicates clearly the view of the learned judge upon the point under consideration, although it was not directly involved in that case. The weight of authority under the Code is against sustaining the demurrer upon this ground.

The appellant's counsel insists that if the demurrer is not sustainable upon the second ground specified in section 144, it is upon the sixth. In this, the counsel is in error. That relates only to the statement of facts constituting the cause of action.

- 11 If this statement fails to show a right of action, then a demurrer on this ground may be interposed. But it has no application to the capacity of the plaintiff to sue or to the other grounds of demurrer specified. Each of these is to be determined by itself in like manner as were the grounds of a special demurrer under the former practice. The judgment appealed from must be affirmed with costs.

HUNT, Ch. J., MASON, LOTT and DANIELS, JJ., concurred with GROVER, J., for affirmance.

- 12 WOODRUFF, J., thought that legislation, either special or general, was necessary always to give an artificial body authority to sue. And, therefore, where there is no allegation of incorporation in an action by such a body, in the complaint, there does appear on the face of the pleading substantially a want of capacity to sue. He was therefore for reversal.

JAMES, J., was for reversal upon the same ground.

Judgment affirmed.

Harmon v. Vanderbilt Hotel Co., 79 Hun, 392.

HARMON v. VANDERBILT HOTEL CO.

*New York Supreme Court, General Term, Second Department,
1894.*

[Reported in 79 Hun, 392.]

1. The omission to state, in a complaint in an action by or against a corporation, whether it is domestic or foreign, and, if foreign, in what jurisdiction incorporated, as required by Code Civ. Pro., § 1775, is not a ground of demurrer. ✓
2. The incorporation of a party as showing its capacity to sue or be sued, is not a part of the cause of action, and the remedy for the omission of the statement required by that section should be sought by motion.

CULLEN, J. This is an appeal from an interlocutory judgment entered upon an order sustaining a demurrer to the plaintiff's complaint. The objection taken to the complaint is, that while it states that the defendant is a corporation, it fails to state whether it is a domestic or foreign corporation, and, if foreign, under the laws of what sovereignty incorporated. 1

That the complaint is defective in failing to make such an averment, which is required by section 1775 of the Code, cannot be doubted. But the question here involved is, whether such defect is ground for demurrer or the subject of motion. It has been the subject of numerous conflicting decisions in this court and in the superior city courts. The exact point has not been determined by the Court of Appeals or passed on in this General Term. We are, therefore, at liberty to decide it as a new question. 2

The grounds of demurrer are specified by section 488 of the Code. The only specified ground under which the demurrer in this case can be brought is that the complaint fails to state facts sufficient to constitute a cause of action, for the cause of action arose in this State, and, even if the defendant were a foreign corporation, the court would have jurisdiction of the subject of the action. 3

The cause of action is the facts which constitute the grounds of the claim against the defendant. In *Fox v. The Erie Preserving Company* (93 N. Y., 54) it is said: "The allegation that

Goddard v. Benson, 15 Abb. Pr., 191.

4 the defendant is a corporation is no part of the cause of action, but simply relates to the character or capacity of the defendant." This dictum is not *obiter*, as suggested, but strictly in point to the question involved in that case. It is true that the provisions of section 1775 of the Code were not under consideration in that case, and that the provision of that section, that the complaint shall state the character of the corporation, is mandatory. But

5 the place of trial and the names of all the parties. For defects in these respects it is settled practice that demurrer will not lie, but that the remedy is by motion. If the complaint stated erroneously the character of the defendant, whether a domestic or foreign corporation, it would not affect the right of the plaintiff to recover. We do not see that an allegation can be deemed part of a cause of action, the successful controversion of which cannot defeat the action.

6 The order appealed from should be reversed, with costs, and judgment given for plaintiff on demurrer, with costs, with leave to defendant to answer within twenty days on the payment of such costs.

BROWN, P. J., and DYKMAN, J., concurred.

Judgment and order reversed, with costs, and judgment given for plaintiff on demurrer, with costs, with leave to defendant to answer in twenty days on payment of such costs.

GODDARD v. BENSON.

New York Common Pleas, General Term, 1862.

[Reported in 15 Abb. Pr., 191.]

1. A demurrer lies to a supplemental pleading.
2. To render a former adjudication a bar, it must appear that the litigation was between the same parties or their privies.
3. By privies are meant persons who are represented by the parties, and who claim under them or in privity with them, who have mutual or successive relationship to the same right or thing.
4. A defence that in an action by one K. against plaintiffs, they set up the same matter and cause of action, and that K. had verdict and judgment,—*Held*, bad, as not showing privity between K. and defendants.

Goddard v. Benson, 15 Abb. Pr., 191.

Appeal from an order sustaining a demurrer to a supplemental answer. 1

This action was brought to recover the value of goods which it was claimed defendants had converted to their own use. The original answer was a general denial. The defendant Benson was allowed to put in a supplemental answer, which alleged that in November, 1860, judgment was recovered in an action brought in this court by one Daniel Kempton against the present plaintiffs, in which they set up as a defence thereto, and litigated therein, the same matter and cause of action as that set forth in the complaint, and the jury, on the trial thereof, rendered a verdict on the merits of their defence, and decided the matters set forth in the complaint, which are recited, and that judgment was rendered therein, and that the same remained of record in the office of the clerk of this court. 2

The plaintiffs demurred, assigning, as a ground of demurrer, that upon the face of the answer it did not constitute a defence.

DALY, F. J. Where the Code allows a supplemental answer, it necessarily allows what is incident to such a pleading, the right to demur to it. This was the rule before the Code, where a plea was put in *puis darrien*. (*Abbot v. Rugerly*, Freem., 252.) 3

The demurrer was well taken. The answer did not allege, nor show, a verdict and judgment upon the same subject-matter between the parties to this suit or their privies. The rule is, that the same point or question when once litigated and settled by a verdict and judgment, shall not be again contested in any subsequent controversy between the same parties or their privies (*Doty v. Brown*, 4 N. Y., 71), and by privies are meant persons who are represented by the parties, and who claim under them, or in privity with them, who have mutual or successive relationship to the same right or thing (1 Greenl. Ev., §§ 189, 523). It does not appear from anything in the supplemental answer, that the defendants in this suit stood in any such relation to Kempton, the plaintiff in the former action. It is not shown what that action was about. All that is averred is, that the plaintiffs in the present suit were defendants in the one brought by Kempton, and that they set up as defence to his suit, that they, as partners in busi- 4

Corning v. Roosevelt, 25 Abb. N. C., 220.

- 5 ness, delivered to Crosby and Benson, the defendants in the present action, a quantity of raw silk to be manufactured, and that the jury found and decided by their verdict that the present plaintiffs did not jointly, and as partners, deliver to Crosby and Benson, silk to be manufactured, as alleged. That would not exclude them from maintaining their present action against Crosby and Benson, unless it is made to appear that there existed that identity of interest between Kempton and the present defendants, in the subject-matter, as would make the defense set up against him equally conclusive in their favor. This is not
- 6 shown by the answer, and judgment, therefore, was properly given for the plaintiffs upon the demurrer.

The order made at Special Term must be affirmed.

CORNING v. ROOSEVELT.

New York Supreme Court, Special Term, 1890.

[Reported in 25 Abb. N. C., 220.]

1. In determining a demurrer to one of the later pleadings in an action [other than a plea in abatement*], the court should consider the sufficiency of all the prior pleadings and render judgment against the party who has interposed the first insufficient pleading. Where, therefore, upon a demurrer for insufficiency to a reply to a counterclaim, the court finds that the reply is sufficient, but that the counterclaim and the complaint are both defective, judgment should be rendered in favor of the defendant upon the insufficient complaint.
 2. *It seems* that a plea of a counterclaim is defective in substance where it contains no demand for judgment in defendant's favor against the plaintiff.
 3. A complaint for specific performance in an action by an assignee of a contract for the sale of certain securities by plaintiff's assignor, which alleges that such assignor (but not plaintiff) is ready and willing to transfer the subject of the sale to defendant, upon the latter paying plaintiff therefor, is insufficient, where the assignor is not a party to the action. *It seems* that in such case the assignment should have included the subject of the sale, or the assignor should have been united as a party.
- 1 Demurrer to reply.

The nature of the pleadings is fully set forth in the opinion.

* See note in 25 Abb. N. C., 224, and cas. cit.

Corning v. Roosevelt, 25 Abb. N. C., 220.

O'BRIEN, J. The defendant has demurred to the reply interposed by the plaintiff to the counterclaim on the ground that it appears upon the face thereof to be insufficient in law. 2

In determining this question it is insisted that all the pleadings should be considered and judgment given against the party who has committed the first error.

In the case of *Williams v. Williams*, recently decided by this court, and reported in the *New York Law Journal*, May 29, 1890, it was held that upon a demurrer to a defense, which would otherwise have been sustained, it should be overruled, and judgment given in favor of the defendant, for the reason that it appeared that the complaint was insufficient in not stating facts sufficient to constitute a cause of action. 3

One good reason, among others, for this rule that might be assigned is that, however defective and insufficient the defense may be, it is, of course, a sufficient defense to an insufficient complaint. *Graham v. Dunnigan* (6 Duer, 629) was a case of a demurrer to a counterclaim, and the court, having viewed the complaint as sufficient, expressly declined to pass upon the question as to whether a complaint could be attacked for insufficiency on a demurrer to the counterclaim. The other cases referred to and commented upon in *Williams v. Williams* (*supra*), holding that the sufficiency of a prior pleading could be inquired into, were all cases of demurrers to defenses. 4

It will thus be seen that the precise question here presented has not been directly passed upon. And while a counterclaim is to be regarded as a new and original cause of action in defendant's favor against the plaintiff, as to which the burden of proof is on the defendant, and which, if insufficient, is to be dismissed, yet it is a pleading in the action resorted to to offset plaintiff's demand in whole or in part, and at times is of such a nature as to entitle the defendant, in addition to securing the satisfaction of plaintiff's claim against him, to an affirmative judgment in his favor. 5

All the pleadings, from the complaint to the demurrer and the reply, are, when used as in this case, but pleadings in a single action, and I am inclined to the view that the true rule is, as has been stated in *Gleason v. Youmans* (9 Abb. N. C., 108),

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- 6 that the demurrer runs through all the preceding pleadings and judgment is to be given against the first party whose pleading is defective in substance. Applying this rule, therefore, and assuming that the demurrer to the reply raises a question as to the sufficiency of all the preceding pleadings, it remains to be determined not only whether the reply itself is sufficient on its face, but whether the counterclaim is good, and as to whether the complaint itself is defective in substance.

- 7 The demurrer to the reply I do not regard as well taken, for the reason that it contains a sufficient denial of the averments constituting the counterclaim. As to the counterclaim itself it is defective, in that there is no demand for any judgment thereon in defendant's favor as against the plaintiff. In addition, there are other defects which it is needless to point out in view of the conclusion at which I have arrived, that the complaint itself is insufficient.

- 8 The plaintiff brings the action as assignee of a right of action which arose upon contract in favor of his assignor, for the purchase and sale of certain bonds and stock. Upon a breach of the contract sued upon, the plaintiff's assignor, or plaintiff himself, as assignee of the cause of action, could have sued, either claiming damages for the breach, or brought an action in effect for the specific performance thereof. This latter is the remedy here sought, and is the theory upon which the plaintiff's complaint has been framed.

- 9 The defendant agreed to pay the sum of \$1,700 in four installments of \$425 each, for which he was to receive from plaintiff's assignor, the Julian Electric Traction Company, two certain first mortgage bonds, of the par value of \$1,000 each, and twenty shares of stock. One of the bonds and half of the stock were to be delivered when one-half of the amount, or two of the installments, were paid as provided. When two installments were paid, one of the bonds and half of the stock were delivered to defendants. In addition, defendant paid the third installment, and then refused to pay the fourth, and it is to recover this fourth installment that this action is brought.

It seems reasonably clear that, upon the payment of this installment, which would fully complete the contract on de-

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fendant's part, the latter would be entitled to an additional bond 10 and stock, as in the agreement provided.

Unless upon the trial plaintiff could show that he was ready and willing to perform the contract, and that he was able to deliver the bond and stock, I do not see how he would be able to force the defendant to specifically perform his part of the contract by paying the last installment. To obviate this objection, however, the complaint alleges, not that plaintiff, but that plaintiff's assignor, the Traction Company, is ready and willing to transfer to the defendant the other ten shares, upon payment by the defendant to the plaintiff, to whom the company has assigned 11 its claim herein, the amount which is still due. Thus it will be seen that the plaintiff, who is neither the owner nor holder of the bond or stock which defendant contracted to purchase, brings a suit to compel the defendant to specifically perform his contract by paying the amount still due, without being in a position himself to complete the contract, upon defendant's so paying such amount. It would appear, therefore, that but part of the cause of action has been assigned, and that the Traction Company should have been joined as a party, so that, upon pay- 12 ment by the defendant, the obligations which would then rest upon the company could be fulfilled, or, in addition to assigning to plaintiff the right to demand the amount due from defendant, they should have assigned as a part of the cause of action the stock necessary to be delivered to defendant upon payment by him.

For the reason, therefore, that I regard the complaint as insufficient, there should be judgment upon the demurrer in defendant's favor, and with leave to serve an amended complaint, upon payment of costs.

Clark v. Dillon, 15 Abb. N. C., 261.

CLARK v. DILLON.

*New York Common Pleas, General Term, 1882 ; Again,
Court of Appeals, 1884.*

[Reported in 15 Abb. N. C., 261 ; s. c., in part, 97 N. Y., 870.]

1. A denial in an answer of "each and every other allegation in said complaint contained, not hereinbefore specially admitted, qualified or denied," is insufficient to raise an issue, and may be wholly disregarded at the trial.
 2. Neither court nor opposing counsel should be called upon to speculate upon what allegations of a complaint have been specifically admitted, qualified or denied.
 3. Whether or not an answer denying only such facts as are not admitted, qualified or denied by previous allegations in the answer, under the rule established by the Code of Civil Procedure, requiring facts in plain and concise language alone to be stated, is good pleading, *query?*
 4. If new matter in the answer goes to admit or qualify the legal effect of allegations in the complaint, such allegations are not traversed by a subsequent general denial in the same answer of allegations not thereinbefore "admitted, qualified or denied."
 5. Hence, in an action for negligence, where such general denial was preceded by allegations that the injuries were caused and contributed to by the person injured, and before the action was brought, defendants fully settled and compromised the claim with plaintiff,—*Held*, that the allegation in the complaint that the defendants made the excavation by which the injuries were occasioned was admitted, and proof of that fact at the trial was unnecessary.
 6. Upon the trial of an action for loss of services, the record of a prior action by the injured person, introduced by defendants in evidence, showed, from the answer served therein, that they admitted that the place in question was a public street and that they caused the excavation to be made therein.—*Held*, that the record unexplained, must be taken as an admission by defendants of the existence of the facts therein asserted, and dispensed with proof by the plaintiff thereof.
- 1 I. *May, 1882.*

Appeal by the defendants from a judgment for the plaintiff entered upon the verdict of a jury.

This action was brought by Albert C. Clark against Sidney Dillon and others, for the loss of the services of plaintiff's wife, who was injured by falling into an excavation made by defendants in a city street.

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The answer averred that the alleged injuries charged in the complaint "were brought about, caused and contributed to" by the wife, and that in a prior action brought by her to recover damages for such injuries, the husband had promised and agreed to waive any claim on his part, if the defendants would settle the action brought by his wife, and that such settlement had been made. The answer then set forth that the defendants "deny each and every other allegation in said complaint contained, not hereinbefore specially admitted, qualified or denied."

Upon the trial, the plaintiffs offered no evidence that the defendants made or caused to be made the excavation, and on that ground, defendants made a motion to dismiss the complaint. The court denied the motion, and the defendants excepted.

The defendants also excepted to the refusal of the court to charge the jury that "before the plaintiff can recover, the jury must determine, as a matter of fact, that the defendants made, or caused to be made, the excavation into which the plaintiff's wife fell.

From the judgment entered for the plaintiff upon the verdict of the jury in his favor, defendants appealed.

BEACH, J. The defendants' counsel asked the trial court to charge the jury that before the plaintiff could recover, they must determine that defendants made the excavation as a matter of fact. No direct evidence was given of the fact. The learned judge held there was no denial of the allegation upon the subject in the complaint. The sufficiency of the pleadings to raise an issue, is the question presented by the appeal.

An answer must contain a general or specific denial of each material allegation of the complaint controverted by the defendant (Code Civ. Pro., § 500, subd. 1). This is a plain rule by which the pleading must be judged, and commends itself by simplicity, directness and the clearness resulting from adherence by the pleader. Under the text of the answer the denial is problematical, leaving for opinion what should not be matter of doubt. Neither court nor opposing counsel should be called upon to speculate upon what allegations of a complaint have been specifically admitted or denied; and what may or may not be qualified,

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- 6 is a proposition whereon there may be great divergence of opinion. This mode of denial has been heretofore condemned, and is so loose and unsatisfactory as to warrant the court, as was done here, in wholly disregarding its claimed effect. Its use by the pleaders is for a drag-net to include what may possibly have been otherwise omitted. If a positive averment of a material fact is not worthy of a direct denial, the court is warranted in assuming that no issue is made upon it (*Miller v. McCloskey*, 1 Civ. Pro. R., 252; *Hammond v. Earle*, 5 Abb. N. C., 105).

- 7 The judgment should be affirmed, with costs.
DALY, Ch. J., and VAN BRUNT, J., concurred.

II. *November, 1884.*

From this judgment of affirmance, defendants appealed to the Court of Appeals.

- 8 RUGER, Ch. J. A defendant, desiring to controvert the allegations of a complaint, may do so either by a general or a specific denial. An omission to do this, in one form or the other, is equivalent to an admission of the truth of the facts alleged and not controverted. Such denials are not required to be of any particular form, or to be couched in any special phraseology, but they must be expressed in language that conveys to the mind of the reader a clear understanding of the facts they are intended to put in issue. It was formerly the settled rule to construe doubtful pleadings most strongly against the pleader, but this rule has been so far modified by the Code as now to require them to be liberally construed with a view to substantial justice between the parties. This modification has, however, been held
- 9 to extend only to matters of form, and not to apply to the fundamental requisites of a cause of action (*Spear v. Downing*, 34 Barb., 522; *Cruger v. Hudson R. R. Co.*, 12 N. Y., 190; *Bunge v. Koop*, 48 N. Y., 225). A construction of doubtful, or uncertain allegations in a pleading which enables a party by thus pleading to throw upon his adversary the hazard of correctly interpreting their meaning, is no more allowable now than formerly, and when a pleading is susceptible of two meanings, that shall be taken which is most unfavorable to the pleader (*Bates v. Rosekrans*, 23 How. Pr., 98).

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It is in the nature of things, that a party who is required to 10
frame his issues for the information of his adversary and the
court, must be responsible for any failure to express his meaning
clearly and unmistakably. While it is competent for a party to
move to make the pleadings of his adversary more definite and
certain, yet, inasmuch as it is the primary duty of the party
pleading to present a clear and unequivocal statement of his alle-
gations, the *onus* of having them made so, cannot be cast upon
his adversary by his own fault in failing to perform his duty.

It is objected in this case, on the part of the appellant, that 11
there is no proof that defendant created the excavation which was
the cause of the injury sued for, or that the place where the same
occurred was a public street.

At the circuit, as also at the general term, this objection was
disposed of upon the ground that the facts necessary to make out
the cause of action in the respect mentioned, were admitted by
the answer.

No question is made but that the complaint states a good
cause of action against the defendant, in respect to the cause of
the injury complained of, and the inquiry now is, whether the 12
facts stated in the complaint have been sufficiently denied by the
answer to put the plaintiff to his proof.

That pleading contained three defenses separately stated, the
first of which substantially alleges that the injuries charged in
the complaint were caused, brought about and contributed to by
the injured party. 2d. That before the commencement of this
action the defendant fully settled and compromised the said
claim with the plaintiff. 3d. A denial of each and every other
allegation in said complaint contained, not hereinbefore specially 13
"admitted, qualified or denied."

The first defense in the answer undoubtedly constitutes a
qualification of every fact stated in the complaint with reference
to the manner in which the accident occurred, and in effect affirms
the truth of the facts alleged, but claims that the action is, not-
withstanding, unsustainable by reason of the contributory negli-
gence of the person injured.

The second contains facts formerly known as being those in
confession and avoidance, and is predicated upon the assumption

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14 of the truth of the facts stated in the complaint, but seeks to avoid them by a defense arising out of the subsequent conduct of the parties; and the third was intended as a general denial of such facts in the complaint as had not been before specially admitted, qualified or denied. The first defense put in issue the question of contributory negligence, and imposed upon the plaintiff the burden of proving that the accident occurred without negligence on the part of the person injured, and that was the only fact put in issue by that defense, the other allegations being impliedly admitted. The fact alleged, however, constituted a good defense to the entire cause of action, and if made out by proof must have resulted in a verdict for the defendants. A good defense to the cause of action stated in the complaint was also alleged in the second count of the answer, and in respect to both of these counts the answer was sufficient in matter and form to preclude a successful demurrer, or motion to strike them out as frivolous.

The question arises over the effect to be ascribed to the alleged general denial. It was said in the case of *Calhoun v. Hallen* 16 (25 Hun, 155) that an answer denying each and every allegation set forth in the complaint, except as herein "admitted, qualified or explained," contains an authorized form of denial, and should not be stricken out as frivolous. This form of answer has sometimes been criticised as throwing upon the opposite party the necessity of first determining the legal question as to how far certain facts stated may properly be said to qualify or explain others, before the pleader can know what facts are admitted or denied by the pleading. Without, however, attempting to determine whether an answer denying only such facts as are not admitted, qualified or denied by previous allegations in the answer 17 under the rule established by the Code, requiring facts in plain and concise language alone to be stated, is good pleading or not, it is sufficient to say in this case, that the material allegations of the complaint are expressly excepted, by the terms in which it is expressed, from the operation of the general denial pleaded.

The allegation by the defendant that the injuries described in the complaint did not occur in the manner and form therein alleged, but impliedly did occur in another manner, which was

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described in a way to exempt the defendant from liability there- 18
for, was a most important and essential qualification of all of
the facts alleged in the complaint.

It cannot reasonably be said that the fact that the party
injured contributed to his own injury is not a qualification of
the allegation in the complaint, that the defendants' conduct, in
digging a pit in a public highway and leaving it unguarded, was
the sole cause of the injury.

The allegations which are denied by this answer are those
only which are *not* qualified by its previous statements. Of 19
what facts stated in the complaint can it be legally said that they
are not qualified by this answer? The allegation, in the com-
plaint, that the injury occurred without the fault or negligence
of the plaintiff's wife, is substantially denied by the first count of
the answer, which affirmatively alleges the reverse of this to be
true, but while this allegation constitutes a denial of the fact
it also operates as a qualification of every other fact going to
make out the cause of action.

The test which has frequently been applied to discover the
true meaning of a pleading, will clearly illustrate the effect of 20
this attempted denial. Suppose the defendants were indicted for
perjury upon the ground that they had verified an answer which
falsely denied that the defendants were the creators of the exca-
vation which caused the injury in question. Could any clause
in this answer be pointed out which proved such a denial? It
certainly cannot be successfully claimed that a clause which
expressly excepted from its operation all allegations in the com-
plaint, *qualified by previous statements* in the answer, was
intended to deny such allegations as *were qualified*. We think 21
that such an indictment could not be sustained upon the plead-
ing, in this case.

It was held in the case of *Allis v. Leonard* (reported in
memorandum 46 N. Y., 688, and more fully, 22 Alb. L. J., 28)
that an answer which admitted the execution and delivery of a
promissory note, and denied every fact not expressly admitted,
did not concede the truth of an allegation in the complaint stat-
ing a transfer upon good consideration of such note by the payee
to the plaintiff. The facts of that case, however, leave no ques-

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22 tion as to what was admitted or claimed, and do not bear upon the question raised here.

But there seems much reason for saying in this case, within the principles stated in *Potter v. Smith* (70 N. Y., 299), and *People v. Northern R. R. Co.* (42 N. Y. 217), that the implied admissions contained in the first and second counts of the answer may be construed as coming within the description of facts excepted from the effect of the general denial as having been therefore specially admitted. However, this may be, there was
23 evidence from which the jury had a right to find the disputed facts.

The defendants proved a settlement by them of an action formerly brought by the wife of the plaintiff against the same defendants, to recover damages for the same injury for which this action is brought. The record of that action was introduced in evidence in this, and shows from the answer served therein that the defendants admitted that the place of the accident in question was a public street, and also that the defendants caused the excavation which was the cause of the injury in question. This evidence seems to have been produced and proved by the
24 defendant, and to have been admitted without objection. Unexplained, it must be taken as an admission on their part of the existence of the facts therein asserted. Both of the facts now claimed by the defendants not to have been proved on this trial appear to have been admitted by them in the record produced, and we think fully authorized the ruling of the court below.

The judgment should be affirmed.

All concurred RAPALLO, J., on the second ground.

NOTE ON THE FORMS OF DENIAL.

1 The question is important for two reasons :

First.—Where the complaint is sworn to for the purpose of requiring a sworn answer, in order that plaintiff may compel defendant to narrow the issue by precluding him from denying what he cannot deny under oath.

Second.—That at the trial the court may at once discern the issue and direct what evidence shall be received without spending time in hearing controversy between counsel as to what is and what is not denied.

Denying conclusion. Where the allegation of the complaint is a conclusion of law without alleging any facts to support it, a denial of the conclusion may be treated at the trial as a sufficient denial. Weinbauer

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v. Morrison, 49 Hun, 498, 500; s. p. *Morrow v. Cougan*, 3 Abb. Pr., 328, 2
refusing to strike out such a denial as frivolous.

Where the complaint, alleging a conclusion, has alleged also facts which support it, a denial of the conclusion only does not raise an issue, if objection be taken at the trial. *Strauss v. Trotter*, 6 Misc., 77; *Adams v. Adams*, 21 Wall. U. S., 185; *Emery v. Baltz*, 94 N. Y., 408; *Lamb v. Hirschberg*, 1 Misc., 108.

But if no objection be taken, a verdict on the issue will not be set aside on the ground that the facts were admitted by bad denial. *Simmons v. Sisson*, 26 N. Y., 264.

Immaterial allegation. If the only allegation denied is one as to amount or value, relevant only to the measure of damages or amount of recovery, it does not raise an issue for trial in an action of a common law nature, unless, under the statute allowing a partial defense to be pleaded, it is pleaded as a partial defense. *Thompson v. Halbert*, 109 N. Y., 329. 3

"*By virtue whereof*;" "*wherefore*." An allegation of facts followed up with a conclusion of law connected by the words "by virtue whereof," or "wherefore," is not a good allegation to require denial unless the facts suffice to raise the conclusion. And a statement in an answer, of facts followed by a similar conclusion, does not raise an issue with the complaint, unless the facts stated give rise to the conclusion as matter of law. See note in Abb. Br. on Pl., §§ 587, 602.

Allegation of material amount or value. An allegation of amount or value which is essential to make out a cause of action, or to show jurisdiction, is traversable; and a denial, even with nothing more, raises an issue. 4
See *Stuart v. Binsse*, 10 Bosw., 436, 446; Abb. Br. on the Pl., p. 441, § 540, with note.

Approximate amount. An indefinite allegation as to amount, such as, that the value or the payment was "about" a specified sum, though not denied, leaves the burden on the party making it to prove the true sum. *Thompson v. Lumley*, 7 Daly. 74; *Woodruff v. Cook*, 25 Barb., 505.

Formal allegations required by rule or statute. It is the better opinion that under the New Procedure, allegations inserted because required by statute or rule of court, although not otherwise part of the cause of action, are admitted by not being denied. Abb. Br. on the Pl., p. 451, § 546.

"*Says he denies*." In endeavoring to fix the line between denials which might be disregarded as evasive and those which though informal must be regarded as sufficient, the courts at one time held that an answer in these words "the defendant says he denies" could be struck out on motion; but it is now settled that this must be regarded as equivalent to "he denies." *Jones v. Ludlam*, 74 N. Y., 61; *Humble v. McDonough*, 5 Misc., 508; s. c. 58 State Rep., 102; 25 N. Y. Supp., 965. 5

A positive denial of each and every allegation in the complaint is good. But a denial of knowledge or information sufficient to form a belief as to each and every allegation may be bad, as evasive, and consistent with possessing knowledge or information as to part only of the allegations. *Waters v. Curtis*, 13 Daly, 179, dictum.

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- 6 *Denial of "material" allegations.* It is the better opinion that a denial expressed simply in the words of the statute as of "each and every material allegation" in the complaint should be treated as evasive. The object of the word "material" in the statute, is to compel defendant to go to judgment if he admits that plaintiff is entitled to recover anything whatever and to prevent prejudice to the defendant on an assessment of damages from his omitting to deny an allegation which is not essential to plaintiff's cause of action; but not to give him the advantage of delaying until the trial the giving of any indication as to what he denies. The statute should therefore be construed distributively, and not allow a denial qualified by the word "material." *Mattison v. Smith*, 19 Abb. Pr., 288; *Hammond v. Earle*, 5 Abb. N. C., 105.

- 7 A denial is *specific*, within the meaning of the Codes, and raises an issue, if it specifies what is denied with sufficient clearness and certainty to dispense with debatable analysis of phraseology, and preclude all discussion and doubt as to what is intended to be denied. *Tracy v. Baker*, 88 Hun, 263, 265; Abb. Br. on the Pl., 477, § 578.

- General or specific denial.* In early cases under the Code it seems to have been thought that every attempted denial which was not general must be specific; and much discussion was had as to the line of distinction between the two; but the object of the statute in sanctioning a specific denial is to have either a general denial or one which specifies what is denied with sufficient particularity to make a clear issue for trial. There may, therefore, be bad denials which cannot be considered to be either specific or general. The present test, therefore, is to inquire does the answer specify what is denied, or does it leave the question to be a matter of argument at the trial. By this test an answer which clearly excepts definite parts of the complaint and clearly denies all the rest—as where it denies all that has not been previously specifically admitted—or in any other way unmistakably discriminates between what allegations are traversed and what are not, is sufficient as being either general or specific; while on the other hand an answer which, after setting forth as defendants' case facts more or less inconsistent with those in the complaint, says that all other allegations not hereinbefore "admitted or avoided," or, "admitted and qualified and explained," or the like, is clearly bad because neither general nor specific. (See authorities collected in 15 Abb. N. C., 271, etc.)

- 9 *Unspecific denial.* A denial of parts of the adversary's allegations, which does not so specifically point to the allegations intended to be denied as to identify them at once without argument or explanation, may be treated as an admission. See Abb. Br. on Pl., p. 477, § 579.

Disregarding lack of specifness. It is not error for the court in its discretion, and in furtherance of justice, to disregard a lack of specifness in a denial, if the adverse party has raised no objection before trial, and is not surprised or prejudiced. Abb. Br. on Pl., p. 478, § 580; *Green v. Raymond*, 14 Weekly Dig., 322; *McGuiness v. Mayor*, etc., 26 Hun, 142; *Spies v. Roberts*, 50 Super. Ct., 301; *Rothschild v. Porter*, 19 N. Y. Supp., 177.

Denial of all allegations on a particular subject. A denial expressed

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to be of "all allegations which charge the defendant with" a specified liability or wrong, is a sufficient denial for the purpose of requiring evidence at the trial. Abb. Br. on Pl., p. 478, § 581.

Sweeping denial, with exception as to what is otherwise answered. A denial expressed as a denial of whatever is not herein qualified, or explained, or of what is not herein admitted, or herein controverted, or specifically denied, is a good denial, if there is no uncertainty as to what it is that the pleader thus has excepted.

When such a denial is recognized by the trial court as putting the adverse party to his proof, if contention arises as to what is to be deemed excepted from the denial, the sweeping denial is to be construed as narrow, and the exception is to be construed broadly, as an admission; and whatever can be said in any sense to be "explained" or "admitted" or "qualified" (or otherwise according to the phrase used), even though it has not been effectually met, stands admitted.

A denial expressed to be of "all contrary hereto" or "inconsistent herewith" may be held bad, as uncertain.

A denial of what is not herein "avoided" is held bad, for whether an allegation is avoided or not is matter of law.

Griffin v. Long Island R. R. Co., 101 N. Y., 348; *Rawlings v. Alexander*, 8 Misc., 514, and for other authorities see Abb. Br. on the Pl., p. 479, § 582.

— *with exception of specified folios.* A denial which specifies the parts of the adversary's pleading intended to be denied, or intended to be excepted from a sweeping denial of all the rest, merely by referring to the folios where or between which they are to be found, does not comply with the statute, and will not serve to present any question in an appellate court. Abb. Br. on the Pl., p. 481, § 583.

Denial by reference to numbered paragraphs. Where the paragraphs of the adversary's pleadings are numbered, a denial expressed as a denial of each and every allegation contained in certain paragraphs, specifying thereby their numbers, is good. *Thompson v. Erie Ry. Co.*, 45 N. Y., 468; *Allis v. Leonard*, 46 *id.*, 688; Note in 15 Abb. N. C., 276.

Denial of specific sum. To an allegation of amount or value, if the specific amount or value is not essential to plaintiff's case a specific denial of that sum merely, without alleging a different sum, is not available as a denial. Abb. Br. on the Pl., p. 482, § 585.

Negative pregnant. A denial in the form of a negative pregnant is not necessarily to be treated as an admission at the trial. *Wall v. Buffalo Water Works Co.*, 18 N. Y., 119; *Parker v. Tillinghast*, 1 State Rep., 296; *Elton v. Markham*, 20 Barb., 843; *Armstrong v. Danahy*, 75 Hun, 405; *Stuber v. McEntee*, 142 N. Y., 200; s. c. 31 Abb. N. C., 246; *Baker v. Bailey*, 16 Barb., 56.

But an answer which confines itself to denying in the same words, including immaterial particulars, such as amounts and dates, an allegation of the complaint, and does not attempt to deny its substance and spirit, may be deemed as admitting the substantial matter of the averment. Abb. Br. on the Pl., p. 486, § 587.

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- 14 *Evasive denial—not covering the allegation.* A denial which is not as broad as the allegation cannot be extended by implication to cover the whole, but the part not covered stands admitted. Denying part of an allegation, without more, is an admission of the residue.

But a denial which is express and sufficient as to the main part of the allegation, and necessarily implies the falsity of the residue, may be sufficient as to the whole. *Spooner v. Delaware, Lackawanna, etc.*, R. R. Co., 115 N. Y., 22, 31; s. c. 28 State Rep., 554; *Churchill v. Bennett*, 8 How. Pr., 309; *Robinson v. Commercial Exchange Ins. Co.*, 1 Abb. Pr. N. S., 186.

- Hypothetical or contingent avoidance.* A good denial is not vitiated by adding a contingent or hypothetical avoidance of the matter already denied. Everitt v. Conklin, 90 N. Y., 645; s. c. p. 168 of this volume.

Conjunctive denial of conjunction. Negative pregnant. To an allegation stating several facts conjunctively, a conjunctive denial only denies the conjunction of both facts, and is not a denial of the separate existence of either fact. Thus to an allegation that defendant took and detained, a denial that he took and detained, avails as an admission that he took, or that he detained, according as may be most favorable to the case of the plaintiff, and only denies that defendant did both.

- But if an allegation states conjunctively several facts all of which are together essential to constitute a material allegation, a conjunctive denial is good. *Kay v. Whittaker*, 44 N. Y., 565; *Collins v. North Side Publishing Co.*, 1 Misc., 211; s. c. 49 State Rep., 37; 20 N. Y. Supp., 892; Abb. Br. 16 on the Pl., p. 489, § 590.

Disjunctive denial. A conjunctive allegation is put in issue by a disjunctive denial. *Hughes v. Chicago, etc., Ry. Co.*, 45 Super. Ct. (J. & S.), 114, 126.

Surplusage in denial. A denial sufficient in itself is not vitiated by the addition to it of any matter not abridging or qualifying it, although not needed to support the denial. *Simmons v. Sisson*, 26 N. Y., 264.

Refusal to admit. An express refusal to admit cannot avail as a denial, even though coupled with an express reservation of the right to give counter-evidence. *Townshend v. Townshend*, 1 Abb. N. C., 81; *Cheever v. Wilson*, 9 Wall. U. S., 108, 122.

- 17 *Mere call for proof.* A call for proof of an allegation, though coupled with an insufficient denial, does not serve as a denial, but is an admission of the allegation.

Submission to court. An answer (other than in behalf of an infant or other person *non sui juris*) submitting to the court the question whether a document alleged and admitted to have been executed, is valid, raises no issue, unless the facts bearing on the question of validity are stated. *Armstrong v. Lear*, 8 Pet. (U. S.), 52.

Admission of some such a contract admits correctness. An express admission of an instrument like that alleged, even though coupled with a denial of all else, or a denial that its terms are correctly and fully stated, is an admission of it as alleged, and dispenses with proof. *Millville Mfg.*

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Co. v. Salter, 15 Abb. N. C., 305; s. c. 1 How. Pr. N. S., 495; *Moody v. Andrews*, 39 N. Y. Super. Ct. (J. & S.), 302; aff'd it seems in 64 N. Y., 641; *Wallach v. Commercial Fire Ins. Co.*, 12 Daly, 387.

Denial of correctness of copy. A denial that the copy, set forth in or annexed to the complaint, of the instrument on which the action is brought, is a correct copy, without showing that it is incorrect in any particular material to the action, is an admission of the correctness of the copy so far as material. *Roberts v. Societa Anonima*, 53 Super. Ct. (J. & S.), 424, 428; *Wallach v. Commercial Fire Ins. Co.*, 12 Daly, 387.

Craving leave to refer. A statement in pleading, that the party asks to refer to the original of a document set forth by his adversary's pleading, is not a denial of the contents, but an admission. *Murray v. N. Y. Life Ins. Co.*, 9 Abb. N. C., 309; s. c. 85 N. Y., 236, 240; rev'g 19 Hun, 350; 19 *Hughes v. Chicago, etc., R. Co.*, 45 Super. Ct. (J. & S.), 114, 122; *Roberts v. Societa Anonima*, 53 *id.*, 424; *Millville Mfg. Co. v. Salter*, 15 Abb. N. C., 305; s. c. 1 How. Pr. N. S., 495; *Wallach v. Commercial Fire Ins. Co.*, 12 Daly, 387.

Direct allegation to contrary. A denial in the form of a direct allegation which is to the contrary of that of the adversary is a good denial, although the word "denial" or its formal equivalent be not used. Otherwise of the mere statement that the "contrary" of an allegation referred to "is true." Abb. Br. on the Pl., p. 494, § 599.

Different version not a denial. Allegations giving a different version of the transaction from that alleged by plaintiff do not avail as a denial. There must be an express traverse of plaintiff's version; otherwise plaintiff's version stands admitted, notwithstanding the defendant's allegations are inconsistent therewith. *East River Electric Light Co. v. Clarke*, 45 State Rep., 635; s. c. 18 N. Y. Supp., 463; *Fleischmann v. Stern*, 90 N. Y., 110, 114; *West v. American Exchange Bank*, 44 Barb., 175.

Different version coupled with denial. A different version, coupled with an allegation that the facts were as thus stated and not otherwise, is a denial, not an admission, of plaintiff's version.

But if defendant alleges a different version, adding "and he therefore denies," etc., the denial is to be interpreted as only a conclusion of the pleader; and is insufficient, if the facts of which it is predicated are insufficient. Abb. Br. on the Pl., 497, § 602.

21

Information and Belief.

A defendant called on to answer will stand in one of five positions in face of any allegation. Either—

1. He knows it to be true, or
2. He knows it to be false, or
3. He has sufficient information to believe it true, or
4. He has sufficient information to believe it false, or
5. He has not sufficient knowledge or information to form a belief either way.

The statute necessarily covers every case by providing for these five positions.

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22 The rights of the defendant in respect to going to issue are as follows :

If he is in the *first* position, knowing the allegation to be true, or the *third*, having reason to believe it true, he is not entitled to put it in issue.

If he is in the *second* position, knowing it to be false, or in the *fourth*, having reason to believe it to be false, he is entitled to put it in issue.

If he is in the *fifth* position, being in ignorance and without reason for belief or disbelief, he is still entitled to put it in issue, for plaintiff must prove his case if there is no reason why defendant should admit it.

The statute for the purpose of enforcing these plain principles requires of defendant in respect of any allegation he desires to controvert, either a denial of the allegation or a denial of any knowledge or information
23 thereof sufficient to form a belief. Code Civ. Pro., § 200. This covers the second, fourth and fifth positions. But in order that plaintiff may know what the defendant who verifies the pleading is swearing to, a denial is declared by section 524 to be in legal effect a positive denial, upon personal knowledge (within the law of perjury) unless it is stated to be made upon the information and belief of the party.

It is clear, therefore, that a defendant not having knowledge or information sufficient to form a belief, should not deny upon information and belief, but should simply state that he has not knowledge or information sufficient to form a belief. If he is in this state of suspense and ignorance he cannot truly deny, for he does not know but that it is true; and the statute does not call upon him to deny. He traverses by duly stating his
24 inability to form any belief. If, on the other hand, he has information sufficient to form a belief that the allegation is false, he is entitled to deny it; but if he is to verify the pleading he must deny upon information and belief. *Brotherton v. Downey*, 21 Hun, 436, is therefore clearly right.

This conclusion is now fully established by *Bennett v. Leeds Mfg. Co.*, 110 N. Y., 150.

But these principles do not sanction a pleader in saying that he answers on information and belief, and thereupon proceeding with unqualified denials, as was done in *Pratt Mfg. Co. v. Jordan Iron Co.*, 5 Civ. Pro. R., 372. That decision was clearly right in condemning such pleading; but we do not think it can be deemed authority for the proposition that a
25 denial upon information and belief is bad, a proposition which is clearly unsound, and if enforced would require many defendants either to admit falsely or swear falsely.

Denials not positive. Under the statutory permission to put the allegations of the complaint in issue by denial "of any knowledge or information thereof sufficient to form a belief," the denial must in substance deny alike the possession of knowledge and the possession of information sufficient to form a belief, as to the matter of fact controverted, and must do this with sufficient distinctness to make a verification perjury if the deponent has either knowledge or information sufficient for the purpose of pleading.

Various departures from the statutory form have, therefore, been

 Note on the Forms of Denial.

condemned, the reason undoubtedly being the door that will be open to 26 evasion by laxity in this respect.

Hence a denial of knowledge is not sufficient. *Heye v. Bolles*, 33 How. Pr., 266; *First Nat. Bk. v. Clarke*, 22 Week. Dig., 569.

An allegation that defendant "does not know of his information or otherwise" is insufficient. *Sayre v. Cushing*, 7 Abb. Pr. Rep., 371.

A denial of information sufficient to form a belief, saying nothing about knowledge, is insufficient. *Elton v. Markham*, 20 Barb., 343; *Lloyd v. Burns*, 38 Super. Ct. (J. & S.), 423; aff'd it seems in 62 N. Y., 651, without opinion.

A denial "for the want of knowledge to form a belief" is bad. *Heye v. Bolles*, 33 How. Pr., 266.

A denial of "knowledge or information sufficient to form a belief, 27 except information from" specified sources, such as documents, without stating what part of the allegation is excepted, or what the information is, admits the whole allegation. *Cuyler v. Bogert*, 3 Paige, 186.

A denial expressed in the alternative as "either upon his own knowledge or as having no knowledge or information sufficient to form a belief" is bad. *Sheldon v. Sabin*, 12 Daly, 84.

And a denial of knowledge or information sufficient to form a belief as to a specified paragraph, instead as to the truth of it, or as to the allegation therein, is bad. *Bidwell v. Overton*, 26 Abb. N. C., 402.

A denial of knowledge or information sufficient to form a belief "as to" a document stated in the complaint is not a denial of an allegation in the complaint that the statements in the document are true. *People v. 28 Fields*, 58 N. Y., 491.

But a statement that "defendant has no knowledge or information sufficient to form a belief as to the truth of an allegation specifically referred to," or "as to any of the allegations in said complaint contained," is good. *Grocers' Bank v. O'Rorke*, 6 Hun, 18; *Meehan v. Harlem Savings Bank*, 5 *id.*, 439.

But denial of knowledge or information sufficient to form a belief seems to be not yet lawful in the New York City District Courts. *Steinam v. Bell*, 7 Misc., 318.

Matters actually or presumptively within deponent's knowledge. A denial of knowledge or information sufficient to form a belief, or a denial upon information and belief of matters which must have been once within 29 deponent's knowledge, and may be presumed to be still within his recollection (*Sheldon v. Heaton*, 78 Hun, 50), or of matters of public and accessible record relating to the subject and of which deponent ought to inform himself before pleading, may be bad. *Austen v. Westchester Telephone Co.*, 8 Misc., 11. Compare cases cited in Abb. Br. on the Pl., p. 497, § 603; p. 502, § 609.

Tenses. A denial in the past tense or the present tense exclusively of a fact in the complaint alleged in either tense or both, may be a bad denial. *Hand v. Rogers*, 8 Misc., 79 (allegation of the complaint that the defendants were and still are partners; answer admitting that they are

Macauley v. Bromell & Barkley Printing Co., 14 Abb. N. C., 816.

30 and denying all that is not admitted, raises an issue on the question whether they were partners at the time past mentioned in the complaint).

And therefore denies the same. When a denial of knowledge or information sufficient to form a belief is properly made, it is not necessary to add "and therefore denies the same." When the denial of knowledge, etc., is defective, it is not aided by such addition. *Meehan v. Harlem Savings Bank*, 5 Hun, 489; *Sackett v. Havens*, 7 Abb. Pr., 371, note; *Flood v. Reynolds*, 18 How. Pr. (N. Y.), 112.

Corporation cases. Since N. Y. Code Civ. Pro., § 1776 dispenses with proof "of the existence of a corporation party, unless the answer is verified and contains an affirmative allegation that the plaintiff or the defendant, as the case may be, is not a corporation," a positive denial, or
31 a denial of knowledge or information sufficient to form a belief as to whether the party is a corporation, is not sufficient. See note on putting corporate existence in issue, *post*.

MACAULEY v. BROMELL & BARKLEY PRINTING COMPANY.

New York City Court, Special Term, 1884.

[Reported in 14 Abb. N. C., 816.]

1. Under Code Civ. Pro., § 524—which requires the verification of a pleading by a corporation to be made by an officer or agent with reference
A to his own knowledge, information or belief—a denial in an answer by a corporation is not to be struck out as frivolous, because expressed to be a denial upon information and belief.*
2. The case of *Shearman v. N. Y. Central Mills*, 1 Abb. Pr., 187, superseded.

* In *Richards v. Frechel* (decided in the same court in the same term), the same principle was applied as superseding the old rule that allegations presumably within the personal knowledge of the defendant could not be denied upon information and belief.

McADAM, J. The complaint alleges "that the plaintiff, at the request of defendant, sold and delivered to him goods to the value and agreed price of \$97.43, no part of which has been paid." The answer, "upon information and belief, denies each and every allegation in said complaint contained." Whether this answer contains a legal form of denial, is the question to be determined.

An answer in the above form was held good in *Brotherton v. Downey* (59 How. Pr., 206); *Stent v. Continental Bank* (5 Abb. N. C. 88), and in *Metraz v. Persall* (*id.*, 90). Where the charges made are, as in this case, presumably within the personal knowledge of the defendant, this form of denial was not formerly allowed. But the cases cited, and that of the *Grocers' Bank v. O'Rorke* (6 Hun, 18), seem to countenance it.

It follows that the motion for judgment on the answer as frivolous must be denied. No costs.

A denial upon information and belief of an alleged public record, to which the party pleading is a party, may be so struck out. *Austin v. Westchester Telephone Co.*, 8 Misc., 11.

It may be otherwise of private acts of the party many years past. *Sheldon v. Heaton*, 78 Hun, 50.

Macauley v. Bromell & Barkley Printing Co., 14 Abb. N. C., 316.

MoADAM, J. The answer, "upon information and belief," 1
denies each and every allegation of the complaint, except the
allegation of the defendant's incorporation." The plaintiff
moves for judgment upon the ground that the answer is sham
and frivolous. The answer is verified by the treasurer of the
corporation, and cannot be stricken out as sham (45 N. Y., 281,
468).

It is said to be frivolous because a corporation cannot deny an
allegation "upon information and belief." The case of *Shearman*
v. New York Central Mills (1 Abb. Pr., 187), decided under the 2
old Code, is relied on by the plaintiff as an authority against the
sufficiency of the answer. It is said in that case that "a corpora-
tion is an artificial being which from its nature can have no
knowledge or belief on any subject, independent of the knowl-
edge or belief of its agents. It is a mere legal entity. It
neither knows nor thinks." Exactly so. But the officers and
agents of the corporation must verify the answer, and must,
under the New Code, do so truthfully under the pain and
penalty of a possible prosecution for perjury. The case cited
intended to hold a corporation to the strict form of denial 3
required (under similar circumstances) from a natural person.
It did not intend to discriminate against corporations, nor to
require from them any different form of plea than the Code
requires from individuals.

Testing that case by this rule, and applying the decisions
under the New Code to the form of the answer, it must be held
good (see 59 How. Pr., 206; 5 Abb. N. C., 88, 90; 6 Hun, 18).
Under these decisions the person verifying the pleading "is
permitted in a great measure to impress upon the pleading the
operation of his mind," that he may make the verification con- 4
scientiously.

In the light of these cases the form of denial used in the
answer, though "upon information and belief," is in accordance
with the present practice, and creates a triable issue of fact,
which must be disposed of by a trial in the regular way.

It follows that the motion for judgment must be denied. No
costs.

Fleischman v. Stern, 90 N. Y., 110.

FLEISCHMAN v. STERN.

New York Court of Appeals, 1882.

[Reported in 90 N. Y., 110.]

1. Statements in an answer merely giving a different version of the transactions from that given in the complaint are not a denial.
2. Under an answer not denying any allegation of the complaint, but stating as the real transaction a transaction different from that set up in the complaint, defendant may be held to have admitted the transaction he has not expressly denied; and cannot prove that which he has alleged as being inconsistent with and therefore disproving the complaint.
3. An admission of a material fact by not denying it is as conclusive upon defendant as an express admission.

1 Action on a promissory note.

The plaintiffs, merchants, brought this action upon a promissory note of \$1,000, bearing date October 13, 1887, made by Z. Stern & Co., payable three months after date, to the order of the defendant, and indorsed to the plaintiffs, in payment of an indebtedness to them, of about \$1,000, for goods theretofore purchased by defendant. These facts were stated in the complaint.

- 2 The defendant denied none of them, but pleaded that the note was made for his accommodation, and indorsed to the plaintiffs under an usurious agreement, whereby they were to give him \$941.92 for the note, and a credit on their books for \$35.83 more, thus taking to themselves \$22.25; the difference between the face of the note and these sums, being \$7.10, in addition to the legal interest while the note should be running to maturity; and demanded, as an affirmative judgment, that the complaint be dismissed and that "he recover his costs and disbursements and
- 3 an allowance of five per cent. on the plaintiffs' claim." •

DANFORTH, J., [*after stating the above facts*]: It is obvious that this demand by one who, if the contract was illegal, was himself a party to it, has nothing to commend it to the court, and there was no reason why it should not have been denied under the provision of the Code that "each material allegation of the complaint not controverted by the answer must, for the purposes of

 Drake v. Cockroft, 1 Abb. Pr., 208.

the action, be taken as true" (§ 522). Here the complaint stated 4
 a clear cause of action, and under the pleadings the plaintiffs
 were not required to prove anything, nor was the defendant at
 liberty either to deny the existence of the facts constituting the
 cause of action, or to prove any state of facts inconsistent with
 such admission. (*Tell v. Beyer*, 38 N. Y., 161.) It is true that
 the agreement set up in the answer as the one by which the
 plaintiffs acquired the note is different from the one stated for
 that purpose in the complaint, but that is not enough to put the
 latter in issue (*West v. American Exchange Bank*, 44 Barb., 175 ;
Marston v. Swett, 66 N. Y., 206, 210 ; 23 Am. Rep., 43), and so 5
 it was thought at the trial. The defendant took the burden upon
 himself, and if we now assume, with the appellant's counsel, that
 the evidence given established the agreement stated by the
 answer, it could not help defendant, nor enable him to avoid the
 effect of an omission to controvert by answer the plaintiffs' alle-
 gations. The Code (§ 522, *supra*) gives to such omission the
 force of a formal admission and makes it conclusive as such upon
 the parties and upon the court. (*Paige v. Willett*, 38 N. Y., 28 ;
Tell v. Beyer, *supra*.) 6

[*The remainder of the opinion, however, reviewed the evidence
 and held that the defence, even if receivable, could not prevail.*]

All the judges concurred, except MILLER, J., absent.

Judgment accordingly.

DRAKE v. COCKROFT.

New York Common Pleas, General Term, 1855.

[Reported in 1 Abb. Pr., 208.]

1. When the facts stated in a complaint show the plaintiff entitled to recover the amount demanded, an answer, which does not deny any fact alleged in the complaint, but merely says "the defendant denies that the said plaintiff is entitled to the money demanded," presents no defence.
2. If the allegations of the plaintiff are sufficient in law to entitle him to recover, the defendant cannot dispute the right of recovery while he admits the facts stated, unless he avers new facts which defeat their otherwise legal operation.

Drake v. Cockroft, 1 Abb. Pr., 208.

1 Motion to strike out part of an answer.

WOODRUFF, J. The complaint herein avers that the plaintiff, on, etc., let the defendant, and the defendant hired and took from the plaintiff, certain premises for the term of one year, from the first of May then next, at the yearly rent of \$925, payable as follows: \$308.33 on the first day of August, 1853; \$308.33 on the first of November, 1853, and the balance, \$308.34, on the first day of February, 1854.

- 2 After setting forth other provisions of the lease not material to this appeal, the complaint further avers that the defendant promised to make punctual payment of the said rent in the manner above mentioned and that the defendant entered into possession of the demised premises under and by virtue of the said hiring, and continued in the possession, etc., until after the first day of February, 1854. That on the first day of August, 1853, the said sum of \$308.33 became due and payable according to the tenor of the said letting and hiring, and that the sum of \$8.33 thereof is now due and owing. That on the first of
- 3 November, 1853, the other sum of \$308.33 became due and payable according to the tenor, etc., and that the sum of \$8.33 is now due and owing, and the said balance of \$308.34 became due and payable on the first day of February, 1854, and the whole thereof is now due and payable. Whereupon the plaintiff demands judgment for \$325, and interest and costs. To which complaint the defendant by answer sets up or attempts to set up three distinct defences.

- 4 For a *first* and distinct defence, the defendant answers that he "*denies* that the said plaintiff *is entitled* to the sum of money demanded in this action or any part thereof."

Reading this supposed "defence" in connection with the legal principle that "every material allegation in the complaint which is not controverted by the answer, shall be taken as true for the purpose of the action," this so called defence amounts to this: "Although I hired the plaintiff's premises for the period stated, and agreed to pay the rent specified, and occupied the premises during the term, and the rent became due and payable according to the tenor of the hiring, and is now due and owing, still the plaintiff is not entitled to such rent." Or in another form,

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“ Although all the facts alleged by the plaintiff are true, still he is not entitled to recover.” 5

I fully concur with the opinion of the first judge at special term that this is no defence at all. If the facts stated by the plaintiff are true, the plaintiff *is entitled* to the sum of money demanded, and this so called first defence is a mere legal falsehood, unless other facts exist which are not stated.

I need not state in the elementary rule of pleading, that a plea or answer which does not deny the facts alleged by the plaintiff must state *facts*, which, if proved, destroy the legal inference that the plaintiff is entitled to recover. If the allegations of the plaintiff are sufficient in law to entitle him to recover, the defendant cannot dispute the right of recovery while he admits the facts stated, unless he avers new facts which defeat their otherwise legal operation. 6

The defendant's counsel on the argument of the appeal, insists that a denial of the plaintiff's right to recover, or a statement that the plaintiff is not entitled to the money, is a statement of a fact. In this I apprehend he overlooks the distinction which often exists between the statement of a truth, and the allegation of a fact. Indeed the terms fact and truth are often used in common parlance as synonymous; but as employed in reference to pleading, they are widely different. A fact, in pleading, is a circumstance, act, event or incident; a truth, is the legal principle which declares or governs the facts and their operation and effect. 7

Admitting the facts stated in a complaint, the truth may be that the plaintiff is not entitled, upon the face of his complaint, to what he claims. The mode in which a defendant sets up that truth for his protection is a demurrer. 8

So also, admitting the facts stated in the complaint, the *truth* may still be that *by reason of the existence of facts which are not disclosed by the complaint*, the plaintiff is not entitled to what he claims. If a defendant wishes to urge this condition of things, he must do it by averring the existence of those facts.

It seemed to me so obvious that this denial of the plaintiff's title to recover, contains nothing which can be called a statement of a fact, that no language could make it more plain; but counsel

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- 9 for the appellant have deemed it doubtful, and pressed it upon our further consideration. The case cited by him (*Allen v. Patterson*, 7 N. Y., 476; s. c., p. 1 of this vol.) does not even tend to sustain such an answer. An averment in a complaint, that the defendant was indebted to the plaintiff for goods sold and delivered by the plaintiff to the defendant, at his request, on a day named, and at a place stated, and that a sum named is due to the plaintiff from the defendant, was held to import, and therefore in substance to be an averment, that at the time and place stated the plaintiff sold and delivered to the
- 10 defendant the goods referred to, and the court in that case distinctly recognized the duty of a pleader distinctly to aver or state every *fact* on which he relies to support the legal proposition upon which his right to maintain or defend the suit is dependent.

[*The judge then discussed a claim for damages suffered by defendant by reason of plaintiff's taking of personal property of defendant, and which was held to have been improperly interposed as a counterclaim.*]

- In my opinion the order striking out what are termed in the
- 11 answer the first and second defences, should be affirmed.

In *Wesson v. Judd*, 1 Abb. Pr., 254, plaintiff sued on an undertaking given to secure a discharge from arrest, setting forth a copy of such undertaking. The answer admitted that the defendant had given a writing, but denied, for want of sufficient information to form a belief, that the writing was correctly set forth in the complaint.—*Held*, that such part of the answer must be stricken out; that defendant is entitled to an inspection of the original to enable him to answer, and cannot deny, merely upon want of information sufficient to form a belief, that the instrument is correctly set forth.

THOMPSON v. ERIE RAILWAY CO.

New York Court of Appeals, 1871.

[Reported in 45 N. Y., 468.]

1. A verified denial, whether general or specific, traversing a material allegation, cannot, upon affidavits showing falsity, be stricken out on motion as sham, for this would be trying an issue on *ex parte* affidavits instead of by common law evidence.

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2. This rule is applicable, whether the action be of a legal or equitable nature.
3. A general denial of a part of a complaint which averred several material facts, cannot be stricken out as sham on the ground that it is necessarily a negative pregnant.
4. An allegation in an answer relied on as a defence, if so wholly immaterial as to be of no avail, may, even though true, be struck out on motion as irrelevant.
5. Section 247 of the Code of Procedure [Code Civ. Pro., § 537] gives no power to order judgment upon one of several defences in an answer as frivolous, where others are good.
6. But if a notice of a motion for judgment for frivolousness, contains a prayer for "other or further relief," the irrelevant defence may be stricken out as irrelevant [Code Civ. Pro., § 153; Code Civ. Pro., § 538].
7. The common stockholders may be proper, but are not necessary, parties to an action by preferred stockholders to compel payment of a dividend to them, in the absence of anything to show that the directors will not properly defend the action.

John W. Thompson, for himself and other owners of preferred stock in the defendant company, sued to compel the company to pay a dividend on the preferred stock pursuant to the agreement under which it had been issued, and to have an accounting and receiver as to net earnings applicable to such dividend. 1

The complaint was as follows :

" Supreme Court.

John W. Thompson, Mary T. DeForest, James Thompson and Rhoda Thompson, in their own behalf, and in behalf of all other holders of the preferred stock of the Erie Railway Company, etc., 2

against

The Erie Railway Company. 3

" The above-named plaintiffs, complaining on behalf of themselves and all other owners and holders of the preferred stock of the said defendant, who shall come in in due time and seek relief by and contribute to the expenses of this action, allege :

" I. That the question which is the subject of this action is

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- 4 one of a common and general interest to all the holders of the preferred stock of the said defendant.

"That, as plaintiffs are informed and believe, the holders of said preferred stock are very numerous, and that they exceed two hundred in number, many of whom are not residents of the State of New York, and whose names are unknown to these plaintiffs, and that they cannot therefore all be joined as parties in this action."

- 5 [The complaint then alleged the incorporation of the plaintiff and its predecessor company; the occurrence of the insolvency of the predecessor company; the making of a contract between that company and its shareholders and creditors, under which the road was sold under foreclosure and, by reorganization, the present company formed; the right to dividends on the preferred stock to be made out of net profits being secured by the contract, and the new company's articles of association. The title of the plaintiffs to shares of the preferred stock was also alleged. The complaint then contained the following allegations:]

- 6 "XI. That the gross earnings of said defendant during the current year, 1869, exceeded the sum of eighteen millions of dollars (which sum does not include a large sum earned and received by defendant in operating certain of its leased roads, as these plaintiffs are informed and believe, the amount of which is unknown to these plaintiffs), and that the net earnings of said defendant during the said year amounted to fully enough to pay to the holders of said preferred stock the dividends or interest as hereinbefore set forth, promised and agreed to be paid, but that said defendant has refused and neglected, and still refuses and neglects, to pay the said dividends or interest on said preferred stock for the year 1869, or any part thereof, although
7 often requested so to do.

"XII. That, as plaintiffs are informed and believe, said defendant has laid out and expended a large part of its said net earnings for the year 1869 in permanent additions and improvements to its property, instead of applying same to the payment of the dividends or interest on the said preferred stock, to the undue advantage of the holders of the common stock of the said defendant, and in fraud of plaintiffs' rights.

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"XIII. That, as plaintiffs are informed and believe, the persons having charge and control of the funds and affairs of said defendant, have diverted and appropriated a large part of the said net earnings of the defendant for the year 1869 to the purchase of and investment in property other than that necessary or proper to be held or owned by said defendant, and not authorized by its charter." 8

The contents of the *answer* were as follows :

"First. For a first defence :

"I. This defendant denies each and every allegation contained in those paragraphs of the complaint which are numbered XI., XII and XIII. 9

"II. The affairs of this defendant are managed by seventeen directors, and the plaintiffs have not asked from any of the said directors any accounting in respect to the matters set forth in the complaint.

"Second. For a second defence :

"I. That the interest of the preferred stockholders of this defendant, of whom the plaintiffs are four, is, in respect to the matters alleged in the complaint, adverse to the interests of the 10 holders of the common stock of this defendant, of whom there are a large number now living in the city of New York, and of whom C. Harvier, Edwin Mead, Paul N. Spofford and Nehemiah Tunis are four, now living in the city of New York.

"II. That this action cannot properly proceed to trial without the presence of one or more of the said holders of common stock to represent their interests, inasmuch as any dividend that should be paid to the holders of preferred stock would necessarily reduce the dividends payable to the holders of common stock.

"III. That the persons who had, at the commencement of this action, and who still have, control of the funds and affairs of this defendant are" [*naming each, and the town or city and State of his residence.*] 11

[*The answer was verified.*]

The plaintiffs on affidavits and on the pleadings and proceedings, moved :

"1. That the first defence in the answer herein of the defendant be stricken out as sham.

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12 "2. For an order overruling said answer as frivolous, and for judgment thereon.

"3. And that the plaintiffs have such other and further relief as may be proper."

The Supreme Court at Special Term held, that the first defence was sham as to the whole of it; that the latter paragraph of the first defence was both sham and frivolous; and that the first defence must be stricken out as sham.

That the second defence was frivolous, and that plaintiffs were
13 entitled to judgment thereon.

It further ordered that plaintiffs have judgment that defendants account and pay over plaintiffs' respective share in the net earnings as shareholders; and it appointed a referee to take the accounting. Other clauses in the order struck out parts of one of the affidavits used on the motion as being irrelevant, impertinent and scandalous.

The opinion given at Special Term (ROSEKRANS, J.) reviewed the evidence presented on the motion, and concluded that the falsity of the first defence was clearly proved. This conclusion
14 was, in the opinion of the learned judge, confirmed by the following criticisms on the pleadings. He said:

"A strong argument to support the allegation of the falsity of this part of the first answer is derived from the manner in which the denial is made of the parts of the complaint which it professes to deny. The denial is of the letter of those allegations and not of their substance. It contains an implication of the truth of so much of the substance of the allegations of the complaint as is sufficient to sustain the action. The denial that the
15 gross earnings of the defendant, for the year 1869, *exceeded* the sum of \$18,000,000, contains an implication that they amounted to just \$18,000,000. The denial that the net earnings of the company during the year 1869 amounted to fully enough to pay to the holders of preferred stock the dividend promised and agreed to be paid (seven per cent. per annum), contains an implication that they were sufficient to pay six and $\frac{2}{100}$ per cent. The denial that the defendant has neglected and refused to pay said dividend, contains the implication, that it has neglected *or* refused to pay such dividend. The denial that the defendant

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has been *often* requested to pay such dividend, contains the 16
implication that it has *once* been requested to pay it. The denial
that the defendant has laid out and expended a *large part* of its
net earnings for 1869, in permanent additions and improvements
to its property, contains the implication that it has expended
some part of those earnings, in the manner alleged. And the
denial that the persons having charge and control of the defend-
ant's funds and affairs have diverted and appropriated a *large*
part of such net earnings to the purchase and investment in 17
property other than that necessary or proper to be held or
owned by the defendant, and not authorized by its charter, con-
tains the implication that *some portion* of such earnings has been
so diverted and appropriated.

"This denial is by way of negative pregnant. It is evasive,
insufficient, tricky. I am aware that the Court of Appeals has
decided, in the case of *Wall v. The Buffalo Water Works Com-*
pany (18 N. Y. R., 119), that when the plaintiff goes to trial
upon such an answer, he waives all objection to its insufficiency,
and admits it to be a perfect denial, and to put in issue the mat-
ters thus denied. But in this case the plaintiff has not gone to 18
trial upon the answer, and has made no such admission. In the
case cited, the prevailing opinion delivered concedes that the
denial was a species of negative pregnant, and, of course, the
implications it contained could be urged by the plaintiffs, if not
waived. Saunders records of himself, in his own reports (*Veale*
v. Warner, Vol. I., 327, a), that KELYNGE, Chief Justice, repre-
hended him for pleading so subtilly on purpose to trick the
plaintiff, but he seemed to derive comfort and consolation under
the rebuke from the fact that the case was, as he said, one of the
greatest hardships on his client, and also from the fact, which he 19
states, that his adversaries did not see the defect of the pleadings
on their part until Saunders himself pointed it out in the court.
No comfort can be derived by the learned counsel who put in
the defendant's answer in this case from either of the sources
which consoled Saunders. This case is not one of hardship on
the defendant, and the mode of its denial is neither a novel nor
an artful evasion. It was known by its present name (negative
pregnant), as early as three centuries ago. Instances are men-

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tioned in the Year Books, 22 H. C., 38, 39, and still later, Lit. R., 65, and Strange R., 483, and the case cited from 18 N. Y. R. brings its use down to the present time. It has been adopted in 'numerous and pressing' instances to ease the conscience of parties, and allow them to evade what they could not fully deny.

21 "But if I am wrong in the view last taken by this denial, the evidence of its falsity first alluded to still remains, and brings the case within the class mentioned by STRONG, J., in *The People v. McCumber*, 18 N. Y. R., 324, in these words: 'Cases may and do frequently arise where the proof of the falsity of a verified answer is so strong that the answer should not be allowed to stand without a special affidavit, stating the particular matters relied on in the support of it.'"

After concluding that the first division of the first answer was sham and should be stricken out, the opinion at Special Term proceeded as follows: "The second subdivision of the first answer is clearly frivolous. It is a statement of new matter. It confesses the allegations of the complaint and seeks to avoid them. This new matter does not constitute a defence. The 22 allegation in the complaint is, that net earnings had been received by the defendant for the year 1869, that plaintiffs had requested payment of a dividend on the preferred stock, and that defendant had neglected and refused to pay it. This cause of action is confessed by the second subdivision of the first answer, and is not avoided by the allegation that plaintiffs had not requested an accounting in respect to the matters alleged. It was sufficient that net earnings had been received by the defendant, that plaintiffs requested payment of a dividend, and that defendant neglected and refused to pay it. The plaintiffs' right of action 23 was perfect from the facts alleged in the complaint, and was not avoided by the new matter set up in the second division of the first answer. The new matter so set up could not have any effect, even upon the question of costs.

"The second answer, containing three subdivisions, numbered 1, 2 and 3, is not a statement of anything. Each subdivision is imperfect, and does not contain a full sentence; neither subdivision commences with a nominative and verb; neither subdivision commences with the words "the defendant alleges,

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or states, or avers." But waiving this informality, and regarding ²⁴ this answer as alleging the facts stated, there is nothing in either of the subdivisions, or in all of them, which constitutes a defence to the cause of action alleged in the complaint. The opening statement of that answer, to the effect that the interest of the preferred stockholders, in respect of the matters alleged in the complaint, is adverse to the interests of the holders of common stock, is frivolous, whether it be regarded as a statement of matter of law or fact.

"The holders of preferred stock are duly entitled to dividends ²⁵ out of net earnings, during the current year, to the extent of seven per cent., and this is all that the plaintiffs claim by their complaint, and in that matter the holders of common stock, by the terms of the contract with the company and the statute under which it was organized, have no interests adverse to that of the preferred stockholders, or otherwise. If the plaintiffs, as holders of preferred stock, claimed a dividend out of any other fund than net earnings during the current year, or to a larger amount than that stipulated for, the interest of the holders of common stock would be adverse to the claim of the holders of preferred stock, ²⁶ but no such claim is made in the complaint, nor is the fact alleged in the answer. This portion of the answer is frivolous, standing alone, and is equally frivolous when read in connection with the residue of the answer. The fact alleged, that the four holders of common stock named are living in the city of New York, is of no legal effect in this case. They are not necessary or proper parties to the action. The action is on a money demand against the company, which it has contracted to pay, and the holders of the common stock have not and cannot claim any ²⁷ interest in this controversy between the plaintiffs and the company, adverse to the plaintiffs. They are not necessary parties to a complete determination or settlement of the questions involved. The court can determine the controversy between the parties now before it, without prejudice to any rights of the holders of the common stock of the company.

"The allegation in the second subdivision of this answer, to the effect that the action cannot properly proceed to trial without the presence of one or more of the holders of common stock

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28 to represent their interest, is also frivolous, whether regarded as a statement of law or fact, and the reason which is alleged as the basis of this allegation is also unsound. Any dividend *that should be paid to the holders of preferred stock* will not and cannot reduce the dividends which are *payable* to the holders of common stock. The holders of common stock are not entitled to any dividends out of the net earnings of the company until the preferred stockholders are paid a dividend of seven per cent., if the net earnings amount to that sum. It might, with equal propriety, be urged that the common stockholders are necessary or
29 proper parties to an action brought by an employee of the company to recover for his services, or in an action by one who had furnished supplies to the company to recover payment of his demand.

“The third subdivision of the second answer is clearly frivolous. It merely states the names and residences of the directors of the defendant. No cause of action is alleged against them. The allegations in the complaint, that the persons having charge and control of the funds and affairs of the defendant have
30 diverted and appropriated a part of its net earnings for the year 1869 to the purchase of and investment in property other than that necessary or proper to be held or owned by the defendant, and not authorized by its charter, is a statement of a cause of action against the Erie Railway Company for the acts of its agents and officers. If the latter could also be sued for the same acts, the plaintiffs are not bound to pursue them alone, or jointly with their principals. The second answer is, for the reasons stated, frivolous in general and frivolous in detail, and the plaintiffs should have judgment thereon.”

31 [Remarks upon the subject of striking out a part of the affidavits are here omitted.]

The General Term, without further opinion, affirmed the order so far as related to the pleadings and judgment thereon.

The Court of Appeals now reversed part of the order, and modified and affirmed the residue.

FOLGER, J. First, had the Special Term the power to strike out the first defence set up in the answer as sham? A *sham*.

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answer is one that is false, and these words, as applied to an answer, are synonymous. (*The People v. McComber*, 18 N. Y., 320.) A defence is sham, in the legal meaning of the term, which is so clearly false in fact that it does not in reality involve any matter of substantial litigation. (*Id.*) The first defence set up in the answer is of two parts. The second part avers that "the affairs of the defendant are managed by seventeen directors, and the plaintiffs have not asked from any of the said directors any accounting in respect to the matters set forth in the complaint." We find nothing in the papers which shows that this allegation is false. 32

It is undoubtedly true. It could not, therefore, be stricken out as sham. For although it may not involve any matter of substantial litigation, it is not because it is clearly false in fact. It will be noticed, however, as we progress, in its character as frivolous or irrelevant.

The first part of the first defence is a general denial of certain material allegations of the complaint.

We have held, in *Wayland v. Tysen*, decided 45 N. Y., 281, that a verified answer which interposes a general denial to the complaint is tantamount to a plea of the general issue under the former system of practice at law; that such answer gives to the defendant the right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery; and that it cannot be stricken out as sham, although shown by affidavits to be false. "This was not upon the ground that a false plea was not sham, but upon the ground that a party, making a demand against another through legal proceedings was required to show his right by common-law evidence, and that *ex parte* affidavits were not such evidence." 34

"When the general issue under the former practice was,"—and a general denial under the present practice is—"interposed as a defence, the party had"—and has—"a right to a trial by jury, which is secured to him by the Constitution" (art. 1, § 2). In *Wayland v. Tysen*, the answer was a general denial of the whole complaint. In the case before us the general denial of the answer is of but a portion of the complaint. Many of the averments of the complaint are admitted, there being no denial 35

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36 of them in the answer. The defendant, it would appear, did not seek to controvert them, and denied, as it might (Code, § 149), the material allegations of the complaint which it did not care to controvert. This section permits "a general . . . denial of each material allegation of the complaint controverted by the defendant." As to those allegations thus denied, the answer is as fully a general denial as is an answer denying the whole complaint a general denial of all its allegations. It puts fully in issue the allegations which are denied, and demands of the plaintiff that he make proof of them. The whole stress of
37 the controversy may be upon the truth of these allegations, and all other averments be no more material than as inducement.

The allegations denied may be so material as that, without establishing them, the plaintiff must entirely fail in his action. A general denial of but these allegations does then so stand in the way of the plaintiffs as that it must be met and overcome by proof. And such proof must in such case, as well as in that of a general denial of the whole complaint, be the common-law proof, which, as was held in *Wayland v. Tysen*, the defendant
38 has the constitutional right to require.

But it may be said that such is the case only in an action seeking relief, according to the rules of the common law, as was the case above cited. And, indeed, it has been held (as in *Sheppard v. Steele*, 43 N. Y., 52), that in an action seeking relief according to the rules of equity, the provision of the Constitution above referred to does not apply. The right of a party to a trial by jury, as there guaranteed, is "in all cases in which it *has been heretofore used*." As courts of equity did not theretofore
39 use the trial by jury, no right is violated when an action seeking relief from the equity power of the court is heard without the aid of a jury. But though the distinction is of necessity still kept up between equitable and legal grounds of claim or defence, they are administered upon by the same court and in the same form of action, and with the same mode of pleading. And whether the complaint sets up a claim formerly cognizable by a court of law, or one entertained only in a court of equity, the answer follows the same form. The issue in the action is arrived at in the same mode of allegation. A general denial is the same

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in either case, and the same rules of practice must apply to it. 40
If it is equivalent to a general issue and puts the plaintiff to the proof of his cause of action in the one case, it does in the other. And if it may not be stricken out as sham, because it is a general denial, in the one case, it may not in the other. And as in the one case the general denial requires of the plaintiff a trial and the proof of his demand before a jury, so in the other the general denial requires of him a trial and the proof of his demand by the production of his witnesses before the proper tribunal in the presence of the defendant, subject to his power of cross-examination. In neither case can affidavits taken *ex parte* out of court 41 determine the issue.

But it is claimed that the first part of the first defence of the answer is a denial by way of negative pregnant; and that such defect in an answer can only be reached by a motion under section 152 of the Code [of Procedure,] to strike out the denial as sham. If this were so (*i. e.*, if it were a negative pregnant), it is doubtful if the plaintiffs could object to it in this way; for the Code gives the right to the defendant to answer by a general denial of each material allegation controverted by him. A 42 general denial of a complaint upon a promissory note, which averred making, indorsing, delivery, presentment for payment, protest and notice, is permissible. Could such a denial be correctly said to be by way of negative pregnant, because it might be, that, though the note was not protested, still all other averments in regard to it were true? To require that such a denial should be stricken out as sham, as amounting to a negative pregnant, would be to take away the right to a general denial of any allegation averring more than one fact, and to exact of the defendant a specific denial of each allegation and of each part of every 43 averment. The general denial of an answer has as wide a scope as the allegation of the complaint which it denies, and it puts in issue all which the plaintiff could be permitted to prove under his averment. If the plaintiff chooses to so broadly frame the allegation of his complaint, as that a general denial of it may still leave specifically undenied some part of the matter comprised in the whole of his allegation, he cannot take from the defendant his right of a general denial, and require him to specifically deny

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44 each part of the whole which the complaint has alleged. Moreover, it is difficult to see how a general denial can be correctly criticised as containing a negative pregnant. The instances given of it in the books do not show a general issue, but a special pleading negating some averment, in the words of the averment, or some part of them, leaving without effectual traverse other parts of the averment. Thus, in trespass, for entering the plaintiff's house, the defendant pleaded a license from the plaintiff's daughter, to which the replication that the defendant did not enter by her license was, before verdict, bad as a negative pregnant,
45 for it did not traverse the averment of the license, and was pregnant with the admission that there was a license. (1 Chitty Pl., 614, margin.)

But a general denial of the whole plea, had such pleading been permissible, would have put in issue the whole averment of the plea. And see *Wall v. Buffalo Water Works Co.* (18 N. Y., 119 and 124).

We are therefore of the opinion that the general denial of the first defence could not be stricken out as sham.

46 The second part of the first defence set up in the answer is open to exception. The fact that the plaintiffs did not, before the commencement of their action, apply to any of the directors for an accounting, was not material or relevant. At the most, it could be of avail on the question of costs. And not proved by the plaintiffs, this would be as available upon this question as if pleaded and proven by the defendant. But if the plaintiffs establish the averments of the complaint, they will show the defendant in default; they will show that they had a rightful claim against the defendant which can be enforced by action.
47 The maintenance of that action will not at all depend upon a prior demand of an accounting; for without either accounting or demand for it, it was incumbent upon the defendant and its directors to have made payment to the plaintiffs, and dereliction in that duty rendered the company liable to an action. (*Stacy v. Graham*, 14 N. Y., 492.) This part of the answer, though not false in fact, was so entirely immaterial as that it might have been stricken out as irrelevant under section 152 of the Code [of Procedure].

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The court at Special Term having stricken out the first answer 48 as sham, and holding the whole second answer frivolous, ordered judgment in the action for the plaintiffs under section 247 of the Code [of Procedure]. If it had been right in striking out the general denial of the first answer as sham, it might have well taken this course ; but as the general denial of the first answer must remain on the record as a good answer, demanding from the plaintiffs proof of the allegations put in issue, the court could not act upon the second answer as frivolous. It could not strike it out for that reason ; for though so frivolous as to entitle the plaintiffs, if it stood alone, to judgment upon it, it cannot be 49 stricken out, but must remain on the record. (*Briggs v. Bergen*, 23 N. Y., 162.) And the better opinion is that the 247th section of the Code [of Procedure] gives no power to order judgment upon a part of an answer as frivolous where there is a part which is held good. But the plaintiffs, in their notice of motion to strike out as sham, and for judgment on the answer as frivolous, also asked for such other relief as may be proper.

We have held, in *The People ex rel. Johnson v. Supervisors of Delaware County* (45 N. Y., 196), that, under such a clause in 50 the notice of motion, relief may be given other than that specifically asked for, and to such extent as is warranted by the facts plainly appearing in the papers on both sides. There is no reason why we may not apply this rule to this case. And though the second answer may not be stricken out as frivolous, nor may the plaintiff have judgment thereon, under section 247 of the Code [of Procedure], yet if it shall appear to be irrelevant it may be stricken out as such under section 152.

The substance of the first two paragraphs of the second defence set up in the answer is that the interests of the plaintiffs 51 are adverse to those of the common stockholders of the Erie Railway Company, and that the action cannot properly proceed to trial without some of the common stockholders are made defendants in it. The plaintiffs cannot recover unless they prove that the net earnings of the company have been large enough to pay them a dividend, according to the agreement by which they became preferred stockholders. And they must establish this 10 to the satisfaction of the court, as a matter of fact, and also as

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52 matter of law, in view of the questions of construction of the agreement which are made. If the plaintiffs do establish this, the common stockholders can, in the eye of the law, have no interest adverse thereto. Then the only pretence can be that the directors, whom the common stockholders have placed in the charge of their property and interests, will not faithfully defend them against assault, and will not so resist the plaintiffs' action as that the questions of fact and the questions of law shall be thoroughly tried.

53 There does not seem force enough in this consideration to justify a court in holding that an averment of such a fact coming from the directors themselves is relevant to the material issues in the action. If the common stockholders were before the court, by motion in their own behalf, asking to be made parties, and showing that the trustees of their own selection were likely to prove faithless to their trust, the question would have more weight.

The defendant has cited authorities to us showing that in certain cases, where there are claims by one set of stockholders
54 which will conflict with the interests of another set of stockholders, it may be proper that both sides of the case should be represented in court by some from each set. We do not understand these authorities to hold that this must in all cases be so, as an inflexible rule. It is a matter in which the court may exercise its discretion, as to who are necessary or proper parties, according as the facts and exigencies of each case appear. We see nothing in the facts of the case before us demanding the bringing in of common stockholders as parties defendant, or which gives warrant for the answer to that effect, or which will
55 justify its interposition to the hindrance of the plaintiffs in their action. In our view, so much of the second defence of the answer may properly be held irrelevant, and may be stricken out as such.

The third paragraph of the second defence is also irrelevant. The plaintiffs allege, as a breach of duty of the defendant to them, that the persons in authorized control of its funds and affairs have diverted and appropriated part of its net earnings. They set up this as a cause of action against the defendant. If

Sherman v. Boehm, 15 Abb. N. C., 254.

it is, it is no answer for the defendant to point out who those 56 persons are. The plaintiffs have chosen to sue the defendant, who cannot, if the plaintiffs have good cause of action, shift them for redress over to others. If the plaintiffs have no cause of action, proof of the averment of the answer setting forth the names of these persons would not tend to establish that. The persons named are not necessary parties to the action. The plaintiffs are not bound to sue them, either in this action or in another against them. This paragraph in the answer seems utterly irrelevant.

Our conclusion is that the order of the General Term and the 57 Special Term should be reversed, in so far as it strikes out the general denial of the first answer, and as it directs judgment for the plaintiffs in the action, and as it orders a reference to take and state an account; that it be modified so far as it holds the plaintiffs entitled to judgment on the second defence set up in the answer as frivolous, and so far as it strikes out the last paragraph of the first defence, and that an order be entered striking out those parts of the answer as irrelevant; and that, except as 58 thus modified or reversed, the order of the General Term be affirmed, and that neither party have costs of this appeal as against the other.

All the judges concurred, except RAPALLO, J., who did not vote. Ordered accordingly.

SHERMAN v. BOEHM.

New York Common Pleas, General Term, 1885.

[Reported in 15 Abb. N. C., 254.]

1. A verified denial upon information and belief may be stricken out on motion as sham, where the moving affidavits show that defendant must have personal knowledge of the subject.
2. It would be otherwise, under the rule in *Wayland v. Tysen*, 45 N. Y., 281, and *Thompson v. Erie Ry. Co.*, *id.*, 468 (*ante*, p. 434), if the affidavits went to the existence of the fact denied, instead of the defendant's possession of knowledge.

The first cause of action alleged in plaintiffs' complaint was 1 for damages for breach of defendants' contract, as partners, to

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- 2 retain plaintiffs as agents and supply them with certain goods for sale. Defendants' answer admitted the partnership, and the writing embodying the alleged contract and contained this clause: "And further answering, on their information and belief, defendants deny each and every allegation and complaint constituting the plaintiffs' first cause of action."

3 Plaintiffs moved that this denial on information and belief be stricken out. The motion was supported by affidavits of each of the plaintiffs that the transactions pleaded in the first cause of action were had by and between the deponents and the defendant Samuel Boehm, who verified the answer, and the defendant Gustave Boehm, his partner, and were in every sense within the actual and personal knowledge of both defendants, and especially of Samuel Boehm, who verified the answer, denying on information and belief.

The Special Term deemed the denials false, but that the motion must be denied under the authorities.

The General Term held in effect as indicated in the head-note (DALY and ALLEN, J. J., concurring; LARREMORE, J., dissenting).

McKYRING v. BULL.

New York Court of Appeals, 1857.

[Reported in 16 N. Y., 297.]

1. A general denial does not let in evidence of payment or any other new matter in the nature of avoidance.
2. This rule applies whether the matter is offered to bar the action or to mitigate damages.
3. The history of the general issue at common law; and the distinction between that plea and a general denial under the Code;—explained.
4. The common law practice affords no sanction for allowing payment or any other matter in confession and avoidance to be proved under a general denial.
5. Strict logical precision in pleading may be required.
6. An answer must traverse facts; traversing legal conclusions does not avail. Hence a denial of an allegation that there is due a specified sum over and above all payments is bad, as denying a mere legal conclusion.

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Action for services.

1

The contents of the *complaint* were : " That said plaintiff and defendant reside in the city of Buffalo ; that this plaintiff, of said city, at the request of said defendant, entered into the employ of him, said defendant, on the 12th day of May, A.D. 1852, as the hired man and servant of all work of him, said defendant ; and that plaintiff continued so in the employ of said defendant, doing work and services for him at his request, until the 3d day of May, 1854, being one year, eleven months and twenty-one days, which work, labor and services, was, and is, worth the sum of \$650. That there is now due to this plaintiff, over and above all payments and offsets on account of said work, the sum of \$134, which said sum defendant refuses to pay.

2

" WHEREFORE, plaintiff demands judgment in this action for the said last mentioned sum and interest from the 4th day of May, 1854, besides costs."

The contents of the *answer* were that : " The defendant . . . denies each and every allegation contained in said complaint."

At the trial, in the Buffalo Superior Court, the judge refused to allow defendant to prove payment, because payment was not pleaded. He excluded also an offer to prove partial payment as matter in mitigation of damages, because not pleaded. Plaintiff had a verdict for the sum he had claimed.

3

The General Term affirmed the judgment.

The Court of Appeals affirmed the judgment.

SELDEN, J. Although the Code of Procedure has abrogated the common law system of pleading, with all its technical rules, yet, in one respect, the new system which it has introduced bears a close analogy to that for which it has been substituted. The general denial allowed by the Code corresponds very nearly with the general issue, in actions of assumpsit and of debt on simple contract, at common law. The decisions upon the subject, therefore, in the English courts, although not obligatory as precedents since the changes introduced by the Code, will nevertheless be found to throw much light upon the question presented here.

4

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- 5 While the general issue, both in *assumpsit* and debt, was in theory what the general denial allowed by the Code is in fact, viz., a simple traverse of the material allegations of the declaration or complaint, yet, from the different phraseology adopted in the two forms of action, a very different result was produced. The declaration, in debt, averred an existing indebtedness, and this amount was traversed by the plea of *nil debet*, in the present tense; hence, nothing could be excluded which tended to prove that there was no subsisting debt when the suit was commenced.
- 6 In *assumpsit*, on the contrary, both the averment in the declaration and the traverse in the plea were in the past instead of the present tense, and related to a time anterior to the commencement of the suit. Under non *assumpsit*, therefore, so long as the rule of pleading which excludes all proof not strictly within the issue was adhered to, no evidence could be received except such as would tend to show that the defendant never made the promise. That this was the view taken of these pleas, in the earlier cases, is clear.

- 7 In an anonymous case, before Lord Holt (1 Salk., 278), it was adjudged "that, in debt for rent, upon *nil debet* pleaded, the statute of limitations may be given in evidence, for the statute has made it no debt at the time of the plea pleaded, the words of which are in the present tense." Again, in *Draper v. Glassop* (1 Lord Ray, 153), the same judge said: "If the defendant pleads non *assumpsit*, he cannot give in evidence the statute of limitations, because the *assumpsit* goes to the *præter* tense; but upon *nil debet* the statute is good evidence, because the issue is joined *per verba de presenti*."

- 8 We find, however, that a practice afterwards grew up, and came at last to be firmly established, of allowing, under the plea of non *assumpsit*, evidence of various defences, which admitted all the essential facts stated in the declaration, but avoided their effect by matter subsequent, such as payment, accord and satisfaction, arbitrament, release, etc. The history and progress of this anomaly is easily traced. The first departure from principle was in relation to the general issue in actions of *indebitatus assumpsit*. In these actions, the promise alleged being a mere legal implication, arising upon the facts stated, a traverse of the

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promise was of course equivalent to a traverse of the allegations upon which it is predicated. Those allegations were regarded as, in substance, the same as in an action of debt upon simple contract; and hence the courts concluded that a plea which put them in issue should have the same effect as the plea of *nil debet*. That this was the reasoning originally resorted to is plain from some of the older cases on the subject. In *Beckford v. Clark* (1 Sid., 236), which was an action of assumpsit brought upon a special promise to secure goods from perils, those of the sea excepted, the Court of King's Bench held, that an assumpsit in fact, upon non assumpsit pleaded, a release could not be given in evidence as a defence, but on assumpsit in law it might. So in the case of *Fits v. Freestone* (1 Mod., 210) it was held that "In an action grounded upon a promise in law, payment before the action brought is allowed to be given in evidence upon non assumpsit; but when the action is grounded upon a special promise, then payment or any other legal discharge must be pleaded." 9 10

But notwithstanding the distinction adverted to in these cases, the admission of the evidence, even in actions of *indebitatus* assumpsit, was a plain departure from the issue upon non assumpsit, which was, in terms, that the defendant had not promised; a departure, however, supposed to be justified as a sacrifice of form to substance. But the courts having already sacrificed substance to form, by allowing an action of debt to be converted into assumpsit by the addition of a mere fictitious promise, had imposed upon themselves the necessity of adhering to this form. By disregarding it, a manifest incongruity in pleading was produced. Tested by the language of the record, there was no difference in the issue formed by the plea of non assumpsit, whether the promise was express or implied; the courts, therefore, lost sight, after a time, of the distinction upon which special defences were originally admitted in actions of *indebitatus* assumpsit alone, and, looking only at the record, took another stride, and admitted evidence of payment, release, arbitrament, etc., under non assumpsit, without regard to the nature of the promise. 11 12

To justify this a new theory was necessary, and we find it

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- 13 broached by an early writer. (Gilb. C. P., 63.) It was, that the gist of the action of assumpsit was the fraud or deceit practiced by the defendant in not performing his promise; and that this was put in issue by the plea of non assumpsit. Hence, any evidence showing that there was no existing obligation at the commencement of the suit, and, consequently, no fraud which was injurious to the plaintiff, would support the plea. The same reasoning is also adopted by a later writer upon pleading. (Laws on Pl., 520, 521.) It is, however, manifestly false and illogical. Fraud or deceit never constituted the gist of the
- 14 action. On the contrary, it has ever been held that fraud need not be alleged, and, if alleged, need not be proved. All the other theories, invented to account for the anomaly, were equally fallacious.

These errors proved, in their consequences, subversive of some of the main objects of pleading. They led to surprises upon the trial, or to an unnecessary extent of preparation. The courts, however, found it impossible to retrace their steps, or to remedy this and other defects in the system of pleading, without

15 authority from Parliament. This authority was at length conferred by the act of 3d and 4th William IV., ch. 42, § 1, and the judges in Hilary term, thereafter, adopted a series of rules, one of which was to correct the errors which have been adverted to. (2 Crompt. & Mees., 10.) The first rule adopted, under the head of assumpsit, provided in substance that the plea of non assumpsit should operate, where the promise was express, as a denial of the promise, and, where it was implied, of the matters of fact upon which the promise was founded.

- 16 The object of this rule was to restore pleading in assumpsit to its original logical simplicity. It was obviously intended as a mere correction of previous judicial errors. It interprets the plea of non assumpsit strictly according to its terms, and thus plainly indicates that the courts had erred in departing from those terms. That this was the view of the judges is shown by the different course taken in regard to the plea of *nil debet*. As this plea, construed according to its terms, included every possible defence within the issue which it formed, the judges did not attempt to change the import of those terms, but

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abrogated the plea. Rule two, under the head of "Covenant 17 and Debt," provides that "The plea of *nil debet* shall not be allowed in any action;" and rule three substitutes the plea of *nunquam indebitatus* in its place. Thus the whole practice, which had continued for centuries, of receiving evidence of payment, and other special defences under the plea of *nil debet* and non assumpsit, was swept away.

There are several inferences to be drawn from this brief review, which have a direct bearing upon our new and unformed system of pleading in this State. The first is, that no argument in favor of allowing payment, or any other matter in confession and avoidance, to be given in evidence under a general denial, can be deduced from the former practice in that respect, as this practice has been abandoned in England, not only as productive of serious inconvenience, but as a violation of all sound rules of interpretation. 18

A second inference is that, in regard to pleading, it is indispensable to adhere to strict logical precision in the interpretation of language. The anomaly which has been referred to was wholly produced by the slight deviation from such precision in 19 the action of *indebitatus assumpsit* which has been pointed out.

But the most important inference to be deduced from the historical sketch just given consists in an admonition to adhere rigidly to that rule of pleading which permits a traverse of facts only, and not of legal conclusions; and this brings us to the pivot upon which the point under consideration must necessarily turn. The counsel for the defendant insists that, as the answer controverts every allegation of the complaint, it puts in issue the allegation with which it concludes, viz., that there was due to the plaintiff at the commencement of the suit, over and above 20 all payments, etc., the sum of \$134. But this allegation is a mere legal conclusion from the facts previously stated. Its nature is not changed by the addition of the words "over and above all payments." No new fact is thereby alleged. The plaintiff voluntarily limits his demand to a sum less than that to which, under the facts averred, he would be entitled.

Were courts to allow allegations of this sort to be traversed, they would fall into the same difficulty which existed in regard

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21 to the plea of *nil debet*, and which led the judges in England to abolish that plea. It would be impossible under such a rule, in a great variety of cases, to exclude any defence whatever, if offered under an answer containing a general denial. In England, as we have seen, after centuries of experience, it has been found most conducive to justice to require the parties virtually to apprise each other of the precise grounds upon which they intend to rely; and the system of pleading prescribed by the Code appears to have been conceived in the same spirit. It was
22 evidently designed to require of parties, in all cases, a plain and distinct statement of the facts which they intend to prove; and any rule which would enable defendants, in a large class of cases to evade this requirement, would be inconsistent with this design.

The case of *Van Gieson v. Van Gieson* (12 Barb., S. C. R., 520) subsequently affirmed in this court, contains nothing in opposition to the doctrine here advanced. That case simply decided that where the complaint contained an averment of non-payment, a plea of payment formed a complete issue. That payment having been denied in the complaint, it was unnecessary
23 to repeat that denial in a reply. My conclusion, therefore, is, that neither payment nor any other defence, which confesses and avoids the cause of action, can in any case be given in evidence as a defence, under an answer containing simply a general denial of the allegations of the complaint.

The next question is, whether evidence of payment, either in whole or in part, is admissible in mitigation of damages. As the Code contains no express rule on the subject of mitigation, except in regard to a single class of actions, this question cannot be properly determined without a recurrence to the principles of
24 the common law. By those principles, defendants in actions sounding in damages were permitted to give in evidence, in mitigation, not only matters having a tendency to reduce the amount of the plaintiff's claim, but, in many cases, facts showing that the plaintiff had in truth no claim whatever. It was not necessarily an objection to matter offered in mitigation, that if properly pleaded it would have constituted a complete defense.

Thus in *Smithies v. Harrison* (1 Lord Raym., 727), the truth of the charge was received in mitigation in an action of slander,

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although not pleaded. Again, in the case of *Abbot v. Chapman* 25 (2 Lev., 81), which was an action of assumpsit, the defendant having given in evidence a release, Lord Holt said that "he should have pleaded *exoneravit*, but that the evidence was admissible in mitigation of damages." So, too, in the modern case of *Nicholl v. Williams* (2 Mees. & Wells., 758), which was assumpsit for use and occupation, the defendant, having pleaded payment to part of the demand and non assumpsit to the residue, was permitted upon the trial to prove payment in full; but it was held that the evidence could only go in mitigation, and that the plaintiff was entitled to judgment for nominal damages. 26

It was obvious that this practice was open to serious objections. It enabled defendants to avail themselves of their defences for all substantial purposes, without giving any notice to the plaintiff. Its unjust operation in the action of slander was observed at an early day, and an attempt was made in the case of *Underwood v. Parks* (2 Stra., 1200) to correct the evil, so far as that action was concerned. But in regard to payment, release, etc., so long as they were received in evidence under the general issue in bar, no objection could be made to allowing 27 them in mitigation. As soon, however, as this practice was abrogated by the rules of Hilary term, 4th William IV., the question as to the admissibility of payment in mitigation at once arose.

In *Leqiard v. Boucher* (7 Carr. & Pa., 1), Lord Denman admitted evidence of part payment under the general issue on the ground that the rule of Hilary term meant "a complete payment, which is an answer to the action, and not a partial payment which merely goes to the amount of the damages;" and in *Shirley v. Jacobs* (7 Carr. & Pa., 3) the Court of Common Pleas 28 held that payment in full might be received in mitigation. TINDAL, Ch. J., says: "I take the meaning of the rule to be this, that 'payment' is used to denote that which is intended as an answer to the action. In the present case the evidence was not offered with that view; it was only offered in reduction of the damages."

These decisions soon led to the adoption of the rule of Trinity term (1st Vict.), by which it is provided that "Payment shall

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- 29 not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar" (4 Mees. & Wells., 4). A question may arise whether by the word "payment," as used in this rule, payment in full only, is meant, or whether it includes partial payment also. The latter, however, must, I apprehend, be its true construction. It would be found as impossible to discriminate between partial payment and payment in full, when offered in mitigation, as it was between proof of the truth of the charge and evidence tending to prove it true in the action of slander, after the rule adopted in *Underwood v.*
- 30 *Parks* (*supra*). Payments may be made at different times and in different sums, the evidence in regard to some of which may be conclusive, and as to others, doubtful; so that in many cases it would not be known whether the proof would establish complete or only partial payments without first taking the verdict of the jury.

The rule of Trinity term (1st Vict.) therefore must be construed to exclude evidence not only of complete, but of partial payment in mitigation, without plea. Such a rule does not lead

31 to the embarrassment which followed the rule of *Underwood v. Parks*. That rule, in effect, excluded all evidence in mitigation, unless pleaded, and there was no way in which it could be pleaded. In regard to payment there is no such difficulty, as that may be pleaded to a part as well as to the whole of a demand. It is not essential to the validity of a plea that it should answer the whole of a declaration or complaint, or of any single count. It is sufficient if it is an answer to so much as it professes to answer. (1 Saund., 299 a, note b; Barnes & Hunt, 11 East, 451; *Nicholl v. Williams*, 2 Mees. & Wells., 758.)

- 32 It has, however, been supposed that a defence could not be interposed to part of a single count, except where such count was capable of a definite division into distinct and independent parts. But some of the modern English cases, and especially the case of *Henry v. Earl* (8 Mees. & Wells., 228), would seem to show that it is not now so regarded in England, at least so far as the plea of payment is concerned; and that that plea may be interposed in an action of debt, to any portion of an entire demand. This consequence, indeed, would seem necessarily to follow from

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the new rules of 4th William IV. and 1st Victoria, even if it was 33 otherwise before. The matter is now placed, therefore, in the English courts, upon a footing of perfect justice. If the demand for which an action is brought has once existed, and the defendant relies upon its having been reduced by payments, he must appear and plead. It is to be determined in this case whether we have kept up with those courts in our measures of reform.

The rules of Hilary term (4th William IV.) and the system of pleading prescribed by the Code, have, in one respect a common object, viz., to prevent parties from surprising each other, 34 by proof of which their pleadings give no notice. Those rules, according to the construction put upon them by the courts, were found inadequate, so far as proving payment in mitigation is concerned, to accomplish the end in view; and it became necessary to adopt the rule of Trinity term (1st Vict.) to remedy the defect. If the provisions of the Code are to receive, in this respect, a construction similar to that given to the rules of Hilary term, then an additional provision will be required to place our practice upon the same basis of justice and convenience with 35 that in England.

But is such a construction necessary? Section one hundred and forty-nine of the Code provides that the answer of a defendant must contain: First, a general or specific denial of the material allegations of the complaint; and, second, a statement of any new matter constituting a defence or counterclaim.

The language here used is imperative; "must contain." It is not left optional with a defendant whether he will plead new matter or not; but all such matter, if it constitute a "defence or 36 counterclaim," must be pleaded; and this is in entire accordance with the general principles of pleading.

The word defence, as here used, must include partial, as well as complete defences; otherwise, it would be no longer possible to plead payment in part of the plaintiff's demand, except in a connection with a denial of the residue; since section one hundred and fifty-three provides that "the plaintiff may, in all cases, demur to an answer containing new matter, where, upon its face,

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37 it does not constitute a counterclaim or defence." Such a restriction would be not only contrary to the general spirit of the Code in regard to pleading, but would obviously conflict with section two hundred and forty-four, subdivision five, which provides that "where the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim," etc. The words "expressly, or by not denying," were, it is true, inserted by amendment since the issue in this case was joined; but they do not change the meaning of the sentence.

38 The question to be determined, then, is, whether these provisions are limited in their operation to cases where the defendant seeks to avail himself of new matter strictly as a defence, either in full or *pro tanto*, or whether they extend to the use of such matter in mitigation. Were there nothing in the Code to indicate the intention of the Legislature on this subject, we might feel constrained to follow the construction put by the English courts upon the rules of Hilary term; although it is evident, 39 from the subsequent adoption of the rule of Trinity term (1st Vict.), that this construction did not accomplish all that was intended. But section two hundred and forty-six provides that in all actions founded upon contract, brought for the recovery of money only, in which the complaint is sworn to, if the defendant fails to answer, the plaintiff is entitled absolutely to judgment for the amount mentioned in the summons, without any assessment of damages. It is plain that, in this class of actions, defendants who have paid part only of the plaintiff's demand must appear and plead such part payment, or they will 40 lose the benefit of it altogether. The provisions of section three hundred and eighty-five afford no adequate remedy in such cases, because the offer to allow judgment for a part does not relieve the defendant from the necessity of controverting the residue by answer.

Section 246 could never have been adopted, therefore, without an intention, on the part of the Legislature, that section 149 should be so construed as to require defendants, at least in this class of actions, to set up part payment by answer; and it is diffi-

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cult to suppose that they intended the section to receive one construction in one class of actions and a different one in another.

My conclusion, therefore, is, that section 149 should be so construed as to require the defendants, in all cases, to plead any new matter constituting either an entire or partial defence, and to prohibit them from giving such matter in evidence upon the assessment of damages when not set up in the answer. Not only payment, therefore, in whole or in part, but release, accord and satisfaction, arbitrament, etc., which may still, for aught I see, be made available in England in mitigation of damages, without plea, must here be pleaded. In this respect, our new system of pleadings under the Code is more symmetrical than that prescribed by the recent rules adopted by the English judges.

The judgment of the Superior Court of Buffalo should be affirmed.

SHANKLAND, J., delivered an opinion to the same effect; COMSTOCK, BROWN and BOWEN, JJ., concurred; PAIGE, J., expressed no opinion, and DENIO, Ch. J., and JOHNSON, J., dissented.

Judgment affirmed.

QUINN v. LLOYD.

New York Court of Appeals, 1869.

[Reported in 41 N. Y., 349.]

If the complaint is framed to sue for a balance, as such, expressly admitting payments to have been made, and not showing the amount originally due, payments may be proved under a general denial.

The complaint alleged :

1

I. — That, in the lifetime of said Richard Quinn, and sometime in the month of August, in the year 1863, in the city of New York, in the State of New York, the above defendant engaged the said Richard Quinn to proceed to England, and there to perform certain work, labor, and services as a surveyor and draughtsman, for which the said defendant promised to pay the said Richard Quinn the sum of \$15 per week in American gold coin.

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- 2 II.—That, in accordance with such engagement, the said Richard Quinn proceeded to the city of London, in England, and there performed certain work, labor, and services for the defendant as a draughtsman and surveyor, whereby the said defendant became, on the 15th day of July, 1864, indebted to the said Richard Quinn in the sum of \$333.07, in American gold coin, being the balance remaining due, after sundry payments made by defendant to said Richard Quinn.

- 3 That, on the 10th day of June, in the year 1864, the said Richard Quinn duly demanded payment of the said sum of the defendant, but no part thereof has been paid.

That, on the said 10th day of June, 1864, the said sum of \$333.²⁷/₁₀₀, in American gold coin, was equivalent to the sum of \$659.³⁴/₁₀₀ currency, in which sum the defendant is now justly indebted to this plaintiff, as administrator, as aforesaid.

[Here followed a second cause of action for such services alleged generally.]

- 4 That, on the 26th day of May, in the year 1867, the said Richard Quinn died intestate, and that on the 27th day of June, 1867, letters of administration upon the estate of said Richard Quinn, deceased, were duly issued and granted to this plaintiff by the Surrogate of the City and County of New York, appointing this plaintiff administrator of all and singular of the goods and chattels, rights and credits, which were of said deceased, and that the plaintiff thereupon duly qualified as such administrator, and entered upon the discharge of the duties of such office.

WHEREFORE, etc.

The contents of defendant's answer were :

- 5 "That he denies each and every allegation of the said complaint, except as to the alleged death of Richard Quinn, and the appointment and qualification of the plaintiff as his administrator, of which allegations this defendant has no knowledge or information sufficient to form a belief."

At the trial, defendant's counsel offered in evidence certain receipts given by deceased during his lifetime to defendant, for moneys paid by said defendant to said deceased on account.

Objected to by plaintiff's counsel, on the ground that, under a

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general denial, evidence of payment as a defence to the action, 6
or of partial payment in mitigation of damages, is inadmissible.
Objection sustained. Defendant's counsel excepted.

The defendant's counsel then moved to amend his answer, so
as to admit the evidence, as follows :

"The defendant admits that the said Richard Quinn, deceased,
performed certain work, labor and services for the defendant,
for which he has been fully paid, except the sum of about two
hundred dollars, which the defendant has never refused to pay."

Plaintiff's counsel opposed the motion on the following 7
grounds :

First.—The answer is intended to set up a defence of new
matter, by way of confession and avoidance ; but the answer does
not confess the allegations as set out in the plaintiff's complaint.
It merely admits that the deceased performed *certain* work, labor,
etc.; this answer would be stricken out, on motion, as frivolous.

Second.—By section 173 of the Code of Procedure, the court,
or a referee, on the trial of a cause, has no power to allow an
amendment of the answer which would amount to an entire
change of defence ; which the defence of payment would in this 8
case be.

Motion denied, and defendant's counsel excepted.

The case was then submitted to the referee, upon whose report
judgment was entered for the plaintiff.

The defendant appealed.

The Superior Court at General Term affirmed the judgment
upon the merits without passing upon this question. [Reported
in 1 Sweeney, 253.]

The Court of Appeals reversed the judgment. 9

Lorr, J. The referee before whom the issues were tried erred
in excluding the receipts given by the deceased in his lifetime
to the defendant, for moneys paid by him to the deceased on
account.

Conceding the general rule to be that payments, either as an
entire defence or in mitigation of damages, must be pleaded, this
case is an exception to it.

[*The learned judge here quoted from the complaint.*]

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- 10 There is no statement showing when the work commenced or ended, or of the time employed, or from which it can be inferred. There is, therefore, not a fact stated by which it can be known to how much compensation the deceased was entitled at the price he was to be paid. The averment that there was an indebtedness by the defendant to the deceased, as "the balance remaining due after sundry payments made by defendant to said Richard Quinn," and the denial of all the allegations in the complaint as to the employment and indebtedness, involved an issue upon the facts above stated and denied, not only of the agreement and
11 of the time which the deceased worked, but necessarily of the different payments made, so as to determine what, in fact, was the balance of the defendant's debt. That balance could not be ascertained without an inquiry as to the amount of the payments, as well as the value of the work performed. The case of *McKyring v. Bull*, 16 N. Y., 297, [s. c., p. 450 of this vol.], relied on by the respondent, cannot be considered an authority to sustain the referee's decision and the judgment of the court below. In that case, the complaint alleged that the plaintiff
12 entered into the employment of the defendant on a particular day, and continued there in doing labor and service for him to a specified and fixed date, and then averred that such work and services were worth the sum of \$650, and then it concluded as follows: "That there is now due to this plaintiff, over and above all payments and offsets on account of said work, the sum of one hundred and thirty four dollars, which said sum defendant refuses to pay." It will be seen by this statement that the term of service and its value were both alleged, from which it appeared that a much larger sum had
13 become payable to the plaintiff than he claimed. The learned judge who gave the prevailing opinion in the case says, in reference to the allegation, that there was due to the plaintiff at the commencement of the suit, over and above all expenses, etc., the sum there named, "is a mere legal conclusion from the facts previously stated. Its nature is not changed by the addition of the words 'over and above all payments.' No new fact is thereby alleged. The plaintiff voluntarily limits his demand to a sum less than that to which under the facts averred, he would be entitled."

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In the case under review, as I have before stated, no facts are 14
alleged from which it can be known what the work, at the
stipulated price agreed to be paid, was worth, and consequently
there is nothing to show that the claim made was less than upon
the facts stated he was entitled to.

We are not to be controlled by a decision upon facts so ma-
terially different in all respects from those in this case. It may be
proper to add that two of the judges, DENIO, Ch. J., and JOHNSON, J.,
dissented from that decision, and PAIGE, J., expressed no opinion.

My conclusion, therefore, is, that on the ground above stated 15
(and without expressing an opinion on the other questions pre-
sented), the judgments appealed must be reversed, and a new
trial ordered, costs to abide the event.

WOODEUFF, J. The plaintiff, by his complaint herein, alleges
that the defendant engaged the plaintiff's intestate to proceed to
England and there perform work, labor, and services as a sur-
veyor and draughtsman, for which he promised to pay him fifteen
dollars per week in American gold coin. That, in accordance
with such engagement the intestate proceeded to England, and 16
there performed certain work, etc., whereby the defendant
became on the 15th of July, 1864, indebted to the intestate in
the sum of \$333.07 in American gold coin, being *the balance
remaining due after sundry payments* made by the defendant.

This allegation, I think, invited an issue upon the question
whether a balance of \$333.07 was or was not due, and the answer
of the defendant put that allegation in issue.

It was wholly unnecessary for the plaintiff to sue for a balance
as such ; he might allege the contract, performance on his part
and claim payment, and then, if the defendant desired to prove 17
payments, he must allege payment in his answer ; but where the
plaintiff sues for a balance, he voluntarily invites examination
into the amount of indebtedness, and the extent of the reduction
thereof by payments, etc.

It was, therefore, error to exclude proof of payments made by
the defendant *on account*, and the receipts given by the intestate
therefor.

[*A minor ruling on a question not involving the pleadings is
here omitted.*]

White v. Smith, 46 N. Y., 418.

WHITE v. SMITH.

New York Court of Appeals, 1871.

[Reported in 46 N. Y., 418; rev'g 1 Lans., 469.]

1. If the complaint, after alleging the original amount of the indebtedness, in substance admits a specific amount as having been paid, the defendant can under a general denial claim the benefit of that admission, and still contest the items which plaintiff has alleged as constituting the original amount.—*So held* where the parties seemed to have acted on that view at the trial.
2. An admission in pleading, forming the issue on trial, is effectual to limit the issues without being offered in evidence.

- 1 The complaint, after alleging the partnership of the plaintiffs as house carpenters and joiners, was as follows :

That between the 13th day of June, 1866, and the 15th day of August, 1866, they, by themselves and their servants, performed work and labor as such carpenters and joiners, and furnished material for the erection of a building on the corner of Franklin and Warren streets, in said village of Watkins, at the request of the said defendant and with her knowledge and

- 2 approbation, to the amount of \$541.90, as by the bill of items therefor, hereto annexed, will fully appear.

That the work and labor so performed for the defendant, and the material so furnished, were reasonably worth the price charged therefor in said bill of particulars.

That there is a balance due from the defendant to the plaintiffs for such work, labor and material, as aforesaid, after deducting all payments made by the defendant to the plaintiffs thereon, of \$175.75.

- 3 THEREFORE, the plaintiffs demand judgment against the defendant for the said sum of \$175.75, with interest thereon since the 15th day of August, 1866, besides the costs and disbursements of this action.

Annexed to this complaint was a bill of items headed "M. T. Smith to W. E. White & Son, Dr.," and footed up \$541.90, but not mentioning any payments.

Defendant's *answer* was a general denial; and, for a separate

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defence, a claim to recoup \$500 for damages by alleged bad 4
work, for which sum the answer asked judgment against plaintiff.

Plaintiffs' reply to the counterclaim was a denial.

The referee found that the amount originally earned by plaintiff was \$501.26 (being \$40.64 less than alleged in the complaint), and he deducted from this the entire sum mentioned in the complaint as having been paid, and gave judgment for \$96.39.

The Supreme Court at General Term were of opinion that the admission of payment should have been treated as conditioned or dependent on the allegation of the sum originally due. 5

BALCOM, P. J., delivering the judgment of that Court [now reversed], said: "The referee could properly have found that the defendant paid the plaintiffs \$366.15 on their claim of \$541.90, prior to the commencement of the action. The just inference from the complaint is that the plaintiffs had been paid that sum on such claim, by the defendant. The amount of the plaintiffs' claim, stated in the complaint, was \$541.90, which is followed by the allegations, that there was a balance due from the defendant to the plaintiffs, on such claim, after deducting all payments made by the defendant to the plaintiffs, of \$175.75; 6
for which balance only judgment was demanded in the complaint, besides interest and costs. The difference between such balance and the amount of the plaintiffs' claim, as alleged in the complaint, was \$366.15, which the referee found that the defendant had paid the plaintiffs.

"It is provided by § 168 of the Code of Procedure,* that the material allegations in the complaint, which are to be taken as true, are those not controverted by the answer. This makes the defendant admit the material allegations of the complaint to be true, which he omits to deny. But it does not authorize the plaintiffs to except to, or complain of a holding that any material allegation of his complaint is true, which is denied, though no evidence be given to establish it by either party, unless the holding wrests such allegation from its true meaning. 7

"I think the referee had the right to assume that the defendant paid the plaintiffs \$366.15, upon the plaintiffs' claim of

* Code Civ. Pro., § 522.

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8 \$541.90; but he found the plaintiffs' claim was only \$501.26, and then held that \$366.15 was paid upon it, without any evidence or admission, except what was inferable from the complaint. I am of the opinion, this holding wrested the allegations of the complaint, respecting payments upon the plaintiffs' claim, from their true meaning, and that it was erroneous.

9 "It seems to me the defendant should have alleged payment in his answer, of \$366.15, and proved it; or that he should have conceded on the trial that the plaintiffs' entire claim was \$541.90, as stated in the complaint, to enable him to insist that the complaint showed he had paid the plaintiffs \$366.15."

The Court of Appeals reversed the judgment.

PECKHAM, J. The plaintiffs' counsel insists that the referee erred in finding a payment of \$366.15 to the plaintiffs. The Supreme Court so held, and upon that ground set aside the judgment. No point of this kind seems to have been presented at the trial, either in the receipt or exclusion of evidence, or by any decision upon any question raised as to the pleadings.

10 But as there was no proof given of any payment, and payment is found and perhaps, sufficiently excepted to, the pleadings must contain an admission thereof, in substance, or the order must be affirmed. I think they do in substance.

The complaint was for work and materials, and sets forth the items specifically, both of labor and materials, amounting to \$541.90. It then claims a balance due therefor, "after deducting all payments made by defendant to plaintiffs thereon of \$175.75."

11 The answer is a general denial, and sets up a counterclaim, etc.

It cannot be denied that this complaint admits in substance that \$366.15 had been paid upon the items in the complaint. It alleged that the items were all just, and that thereafter deducting all payments, there was yet that balance due. It is clear that both parties acted upon the view that the complaint conceded a payment, and I think with good ground.

The Supreme Court says that the defendant "should have conceded on the trial that the plaintiffs' entire claim was \$541.90,

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as stated in the complaint, to enable him to insist that the complaint showed he had paid the plaintiffs \$366.15."

It is clear that the items must all be taken as true to ascertain the amount of the payment, but as a payment it cannot be claimed to have been any less than that sum, upon those items. Whether the items were all legitimate, were all the subject of recovery, was another question.

The referee, upon the evidence, found the said items that were recoverable amounted to \$501.26, instead of \$541.90. Upon the theory of that Court, the difference, or \$40.64, was the precise error of the referee. I think he committed no error in that.

It is also alleged that no portion of the complaint was read as evidence before the referee. It was not necessary to read the pleadings. They are presumed to have been before the referee, and that he had knowledge of their contents.

[A minor ruling is here omitted.]

KNAPP v. ROCHE.

New York Court of Appeals, 1884.

[Reported in 94 N. Y., 329.]

1. In an action by the receiver of a bank, against its officers, for damages, a mere allegation that they made illegal loans will not show a cause of action; but non-payment of such loans must be alleged in order to show damage.
2. Where the defendant's liability depends on non-payment by a third person, such non-payment is a fact essential for plaintiff to allege and prove, and in such case, a general denial lets in evidence of payment.
3. In an action of tort, a general denial lets in any evidence controverting the allegations of damage contained in the complaint.
4. If the action is against joint tortfeasors, the denial will let in payments made by either or both.
5. Such evidence is proper in mitigation.

Action by a receiver, for damages.

The *complaint* contained allegations to the following effect:—the incorporation of the Bowling Green Savings Bank; its

Knapp v. Roche, 94 N. Y., 829.

2 dissolution; the appointment of the plaintiff as receiver and leave given him to sue. Then followed a quotation from the act of incorporation, forbidding the use of its funds or deposits for any purpose except to pay necessary current expenses, under the direction of the Board of Trustees; and providing that the affirmative vote of at least five members of the board should be requisite in making any order for the investment of any moneys, or for the sale or transfer of any stock or security.

3 The complaint then proceeded to allege that the defendant, Walter Roche, was vice-president of the bank from its organization to its dissolution; that without the affirmative vote of five members and without any authority whatever, he took and loaned the moneys of the corporation to the Avenue "C" Railroad Co. of New York City, "of which the sum of \$48,825.30 remains due and unpaid."

Then followed similar allegations as to other loans, concluding thus:

4 "The plaintiff further shows that all and each of said loans and advances were made by the defendant while he was vice-president of said bank, and were made with and out of the funds and moneys belonging to said bank, and that none of said loans were authorized by the affirmative vote of at least five trustees of said bank, nor were said loans or advances made upon the securities or collaterals required by the charter of said bank, or upon any security or collateral whatever."

5 The *answer* denied knowledge or information sufficient to form a belief as to the allegations relating to the appointment of plaintiff as receiver; admitted the incorporation, but denied that he was vice-president from November, 1871, up to time of its dissolution; and concluded thus: "The defendant denies each and every other allegation in the said complaint contained."

A supplemental answer alleged that Henry Smith, deceased, and Reeves E. Selmes, were respectively president and secretary of the bank, and that the loans were made with their knowledge, consent, and by their direction, and that they were jointly liable with defendant for them, and that the plaintiff had settled, compromised and discharged the claim and cause of action stated in the complaint with Henry Smith, deceased, in his lifetime, and

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with said Reeves E. Selmes or one of them, and that thereupon 6
they and the defendant became, and each of them was remised,
released and forever discharged from every claim and demand
which the plaintiff as receiver had against them, or the defend-
ant by reason of the matters or either of them set forth in the
complaint.

At the trial the judge refused to receive evidence of payment.

The General Term affirmed the judgment.

The Court of Appeals now reversed it. 7

RUGER, Ch. J. This action is brought by the receiver of an
insolvent money corporation against its vice president to recover
damages for losses occasioned by alleged illegal loans made by
him of the funds of the corporation.

Such corporation was a savings bank, organized under a
special act of the Legislature (Chap. 831, Laws of 1868), by
which it was authorized to invest its funds only in certain
specified securities.

It was claimed that the defendant loaned the moneys of the 8
bank to Avenue C railroad, and to one D. K. Colburn, upon
securities not authorized by the act of incorporation.

The only damage occurring to such bank in consequence of
the acts of the defendant, as stated in the complaint, was that
such loans remained due and unpaid at the time of the com-
mencement of the action.

To this part of the complaint the defendant interposed a
general denial. The defendant also, by a supplemental answer,
pleaded as a defence to the action that Henry Smith, president, 9
and Reeves E. Selmes, secretary of said bank, were jointly liable
with defendant for the causes of action alleged in the complaint,
and that for a good consideration paid by the said Smith and
Selmes to the plaintiff they had been released and discharged
from liability on account of said several causes of action, and
claimed that thereby the said defendant became also discharged
therefrom.

In support of the action on the trial the plaintiff gave evidence
tending to show that Henry Smith, the president; Reeves E.

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- 10 Selmes, secretary; and the defendant, as vice-president of the Bowling Green Savings Bank, co-operated in making the alleged illegal loans, and that portions of such loans remained unpaid when the case was tried.

The defendant, in answer to the case made by the plaintiff, offered to prove the payment by Henry Smith to the plaintiff of the sum of \$45,000 on account of the alleged overdrafts which the evidence showed were the basis of the plaintiff's claim against the defendant.

- 11 This evidence was upon objection excluded by the court, and the defendant excepted to such exclusion.

In rejecting this evidence we think the court erred. The allegations in the complaint that the several unauthorized loans made by the defendant remained unpaid at the commencement of the action were necessary and material in order to constitute a good cause of action against the defendant. In the absence of these allegations there would have been shown by the complaint no cause of action, inasmuch as it showed no damage resulting to the plaintiff from the injuries complained of

- 12 It is essential to the maintenance of an action for a tort that damages should accompany the act complained of, otherwise it is *damnum absque injuria*, for which no action lies. (Commercial Bk. v. Ten Eyck, 48 N. Y., 305; People v. Stephens, 71 *id.*, 541.)

The mere allegation that the officers of a bank have made illegal loans of the moneys of such bank, or committed other tortious acts, would not show a cause of action in favor of the bank against the officers.

- 13 It was, therefore, an essential part of the plaintiff's case to allege the non-payment of the loans in question, from which the damage to the plaintiff might be inferred.

This may not have been very correct pleading on the part of the plaintiff, but it constitutes the only theory upon which the complaint can be held to have stated a cause of action.

A general denial of the allegations of the complaint, therefore, put in issue the fact of non-payment, and rendered evidence controverting that fact admissible under the answer.

While it is generally true that a defence of payment is inad-

Knapp v. Roche, 94 N. Y., 329.

missible under a general denial, this is not so when the fact of 14 non-payment is alleged in the complaint as a necessary and material fact to constitute a cause of action. (*Van Giesen v. Van Giesen*, 10 N. Y., 316; *McKyring v. Bull*, 16 *id.*, 297, p. 450 of this vol.; *Quinn v. Lloyd*, 41 *id.*, 349, p. 461 of this vol.) It is always competent to prove under a general denial any facts tending to controvert the material affirmative allegations of a complaint. (*Quinn v. Lloyd*, *supra*; *Beaty v. Swarthout*, 32 Barb., 293; *Howell v. Biddlecom*, 62 *id.*, 131.)

Under the general denial in this case it was competent for defendant to prove any facts tending to show that the plaintiff had 15 not suffered damages to the extent claimed by him. For this purpose he could prove that the moneys illegally taken from the bank had been refunded, either by the alleged borrower or anyone jointly liable with himself for the injury complained of. (*Hun v. Van Dyck*, 26 Hun, 567; affirmed, 92 N. Y., 660.) While a plea of payment by a stranger, between whom and the defendant there is no privity, has sometimes been held to be unavailable as a defence (*Bleakley v. White*, 4 Paige, 654; *Atlantic Dock Co. v. Mayor of N. Y.*, 53 N. Y., 67), yet satisfaction 16 by one joint tortfeasor has always been held to be available as a bar to an action against another. (*Livingston v. Bishop*, 1 Johns, 291; *Thomas v. Rumsey*, 6 *id.*, 31; *Barrett v. Third Avenue R. R. Co.*, 45 N. Y., 635; *Woods v. Pangburn*, 75 *id.*, 498.) This rule applies with equal reason to a partial satisfaction by one of the wrong-doers for the damages occasioned by the joint wrongful act of both. Such evidence is proper in mitigation of damages, and under the former practice was admissible under the general issue. (*Daniels v. Hallenbeck*, 19 Wend., 409; *Bush v. Prosser*, 11 N. Y., 347; *Wilmarth v. Babcock*, 2 Hill, 17 194.)

Without considering the other questions raised on this appeal, we think that, for the reasons stated, the judgment should be reversed and a new trial ordered with costs to abide the event.

All the judges concurred.

Judgment reversed.

Lent v. New York, Massachusetts Railway Co., 130 N. Y., 504.

WHITMAN v. FOLEY.

New York Court of Appeals, 1891.

[Reported in 125 N. Y., 651.]

In foreclosure, an answer alleging that the sums mentioned in the complaint were not due and unpaid; that sums had been paid thereon, but the times and amounts defendant was unable to state,—*Held* sufficient at the trial.

- 1 The plaintiff brought this action for a foreclosure of two mortgages, alleging a certain indebtedness to be due upon the bonds for principal and interest. These appellants answered, alleging that the sums mentioned in the complaint were not due nor unpaid, and that sums were paid thereon, "the times of payment and the amounts these defendants are not now able to state."

- 2 GRAY, J. [*delivering the opinion of the Court, said upon this point*]: The form of their pleading is open to the respondent's criticism, and it is both inartistic and loose; but it cannot be taken as containing any admission of the plaintiff's allegations as to the amount due from the defendants, and whatever the objections to its sufficiency, they must be deemed to have been waived by proceeding to a trial upon the merits. The failure to raise any such question by a proper motion or exception precludes its discussion in the Appellate Court. (*Cowing v. Altman*, 79 N. Y., 167.) The issue was presented as to the amount for which the mortgage deeds were still a lien upon the lands described in the complaint, and that was the issue which was referred to the referee to hear and determine.

LENT v. NEW YORK, MASSACHUSETTS RAILWAY
COMPANY.

New York Court of Appeals, Second Division, January, 1892.

[Reported in 130 N. Y., 504.]

1. In an action against a railroad company to recover the amount of an award against it for land taken under L. 1850, c. 14, § 18, as amended by L. 1876, c. 198, the complaint is demurrable if it does not allege

Lent v. New York, Massachusetts Railway Co., 180 N. Y., 504.

record of the award or of a certified copy, and also non-payment of it.

2. *It seems* that in every action upon an ordinary contract for the payment of money, non-payment is a fact which constitutes the breach of the contract and is the essence of the action, and must be alleged and proved.*

* This case treats a question of much importance.

The opinion in 180 N. Y., 510, lays down the above rule, and attributes the rule that payment is an affirmative defense which must be pleaded by defendant in order to allow him to prove it, to the history of pleading, regarding it as exceptional; and concludes that non-payment being the breach of the contract *must be alleged* by plaintiff, because it *must be proved* to enable him to recover.

The principles laid down in the latter half of the opinion are there applied to all ordinary contracts for the payment of money; and the rule that non-payment must be proved by plaintiff as a part of his cause of action, if it means that he must give any direct evidence on the point, involves some consequences that deserve careful examination.

Let us take the case of a defendant's express absolute promise to pay money.

No doubt a formal allegation of non-payment is usual. No doubt the question, "has any part of it ever been paid?" is a usual part of the plaintiff's examination as a witness. No doubt that if the promise be in writing—as for instance a promissory note—the production of it from plaintiff's possession uncanceled, will fulfill the requirement for evidence of non-payment. See *Gray v. Gray*, 47 N. Y., 552; *rev'g* 2 *Lans.*, 178, and *Clift v. Moses*, 112 N. Y., 426.

The question whether plaintiff *must* prove non-payment may well be tested by taking the case of an action by or against the estate of a decedent.

Non-payment is usually a fact which can only be proved by a party. An agent who had entire charge of his principal's payments or receipts could give satisfactory evidence that a debt due to or from his principal had not been paid in the ordinary course of business. But even if the testimony of such an exclusive agent be sufficient, yet non-payment could not be proved by an ordinary agent.

Usually when an executor or administrator sues on an oral or implied contract to pay the decedent, the only evidence he can give of non-payment is that he does not know and cannot learn of any payment. If this is competent and sufficient it is a departure from ordinary rules of evidence. See *Carroll v. Deirnel*, 95 N. Y., 252; *Uline v. N. Y. Central R. Co.*, 14 *Weekly Dig.*, 575.

When an executor or administrator is sued, the plaintiff is not competent to testify to non-payment.

The rule of the case in the text, then, applied in this large class of cases would, under present rules of evidence, work great hardship in many

Note on Burden of Proof as to Non-Payment.

- 4 cases, while at the same time it could exclude many unfounded claims against estates by requiring claimants to prove what frequently they cannot give any evidence of. It is true the statute providing for the presentation of sworn claims requires the affidavit to show that no payments, etc., have been made. But it has been held, I understand, that on a reference of such a claim, when disputed, the claimant does not fail by reason of inability to testify to non-payment.

- 5 I think the present usual practice may be fairly stated in saying that plaintiff always makes in pleading a formal allegation of non-payment (which, however, is not issuable); that he comes to trial provided, if practicable, with some kind of evidence or apology for evidence of non-payment, even if only a witness to swear that he does not know of any payment; that if regular and competent evidence of non-payment is not produced, nevertheless evidence of an absolute, unconditional promise to pay, with nothing whatever to rebut the familiar presumption that a state of things shown once to exist is presumed to continue, is—considering that to require proof of non-payment is requiring proof of a negative—deemed sufficient to cast on defendant the burden of proof as to payment. It is noteworthy that the 2d division of the Court of Appeals held in *Anderson v. Culver*, 127 N. Y., 377, that no direct evidence of non-payment was necessary in foreclosure, even where defendant produced the bond from his own possession under a plea of payment.

- 6 I conclude that the true solution of the question lies in this distinction, that the presumption of continuance of a fact is a rule of evidence (*Fare v. Payne*, 40 Vt., 615) but not a rule of pleading (*Parkhurst v. Wolf*, 47 N. Y. Super. Ct. [J. & S.], 320; *People v. Fadner*, 10 Abb. N. C., 462); in other words that argumentative pleading is bad, but argumentative evidence is good. Therefore a formal allegation of non-payment, though it may be necessary, may be sufficiently proved by the presumption that an indebtedness shown to have existed continued; and is more clearly proved if the obligation is a written one, by producing it uncanceled. This presumption having been raised, cannot be rebutted by evidence of payment, nor of release, nor of any other new matter, unless such payment or other new matter has been pleaded.

- 7 The view which I believe has generally been held by the profession since *McKyring v. Bull*, is, that if defendant is sued on his own unqualified promise to pay, express or implied, and overdue, an allegation of non-payment is not technically essential. *Andrews v. Moller*, 37 Hun, 480. (Compare *Turner v. Kouwenhoven*, 100 N. Y., 115.) The burden is on defendant to prove payment. *Eagan v. Kergill*, 1 Dem., 464; *Foot v. Valentine*, 48 Hun, 475.

But if defendant is sued on a promise to pay in case another person does not, non-payment by that other must be alleged (*Knapp v. Roche*, 94 N. Y., 329); and in such case the allegation is put in issue by the general denial (*ib.*, and *Newton v. Gould*, 14 State Rep., 397).

The case of *Knapp v. Roche* has been regarded as dispensing with defendant's allegation of payment only in that class of cases where non-

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payment by a third person is a condition precedent, and the payment relied on is one made by such third person. *Wemple v. McManus*, 39 State Rep., 141; s. c. 15 N. Y. Supp., 8. In that class of cases it is clear that plaintiff must allege such non-payment. In other cases, where the breach is defendant's own promise to pay, the burden of proof as to payment cannot be upon both parties; no direct evidence of non-payment is required, and if a formal allegation of non-payment be essential, the omission of it ought to be regarded as a formal error amendable at the trial. [From Note in 28 Abb. N. C., 478.] 8

CRANE v POWELL.

New York Court of Appeals, 1893.

[Reported in 139 N. Y., 379; s. c. 30 Abb. N. C., 419.]

1. Where a complaint on contract does not show the contract sued on to be invalid under the Statute of Frauds, the statute is waived by defendant unless specially pleaded as a defence, and cannot be taken advantage of under a general denial.
2. *It seems* that the Statute of Frauds merely introduces a new rule of evidence, and does not make a contract not complying with it illegal; and therefore, although plaintiff prove only an oral contract, defendant cannot for the first time interpose the statute by a motion to dismiss the complaint at the close of plaintiff's evidence.

Action to recover damages for breach of contract for board and lodging. The facts fully appear in the opinion. 1

At Trial Term judgment was entered for plaintiff on a verdict.

The General Term of the Court of Common Pleas affirmed the judgment.

The Court of Appeals affirmed the judgment. 2

O'BRIEN, J. The plaintiff recovered damages for the breach of an agreement, which, on the trial, appeared to be oral. The complaint alleges that the plaintiff, in the month of October, 1887, was in the possession, under a lease, of a house in the city of New York, and that she entered into an agreement with the defendant whereby the defendant leased from her for the term of one year from the first day of November, 1887, the two front

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- 3 rooms on the second floor, and the back parlor and extension room, with the use of the front parlor on the first floor, with board and attendance to be furnished during the time by the plaintiff for the defendant and his assistant or associate in business, for the sum of \$3,250, payable in equal monthly payments of \$270.83 in advance. The defendant was a practicing physician, and the rooms were intended, in part, at least, to serve the purpose of an office, in which the defendant was to carry on his business. The defendant, in pursuance of this agreement, entered into and took possession of the rooms, and used them
- 4 for the purpose intended, and he and his associate were furnished with board and attendance until the month of June, 1888, when, without the consent of the plaintiff, he abandoned the premises, and refused to further perform the agreement on his part, though the plaintiff was at all times ready and willing to perform on her part. It was also stipulated, as a part of said agreement, that the defendant, for the purpose of his business, should have the privilege of affixing in a suitable place on the front of the house, his business sign, and that in pursuance of
- 5 that right, conferred by the agreement, he did affix, upon taking possession on the first of November, at the side of the front door, a metallic sign with his name and professional business upon it, and also words and figures indicating when he could be found by patients and callers at his rooms in the house. The judgment appealed from was recovered by the plaintiff as damages for a breach of this agreement. It appears that he paid the stipulated monthly payments only up to June 1, 1888, and the plaintiff claims that on or about July 1 thereafter, in consequence of the defendant's refusal to further perform his agreement, her home
- 6 and business was broken up and she was obliged to surrender her lease, which then had about two years to run, to her landlord. The jury allowed the plaintiff for the month of June the whole of the monthly payment, but the General Term modified the damages for that month by deducting what it would actually cost the plaintiff to furnish board for two persons during that time, and for the four remaining months of the time the plaintiff recovered only the profits which she would have made had the defendant performed. The defendant's answer admits that during

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the time he was engaged in business as a physician, and that the plaintiff, at the time of the alleged agreement, was the lessee of and in possession of the house, and all the other allegations of the complaint were denied, but no other defence was pleaded. At the trial it appeared that the contract sued upon was not in writing, but the defendant made no objection to oral proof to establish it, and the plaintiff was permitted, without objection, to testify to a verbal agreement to sustain the allegations of the complaint. When the plaintiff rested, however, and again at the close of the case, the defendant moved to dismiss the complaint, on the ground, among others, that as the agreement was not in writing, and as it was not to be performed within one year from the making thereof, it was void by the Statute of Frauds. The Court refused to rule in accordance with this request, and the defendant excepted. The defendant, in his own behalf, testified that there was no time specified for the duration of the agreement, and there was a sharp conflict in the evidence between him and the plaintiff, who claimed that it was to last for one year. The plaintiff's version of the transaction was sustained in some degree by circumstances and by proof of admissions claimed to have been made by the defendant. That question was submitted to the jury by the learned trial judge, with proper instructions, and the verdict must be taken as a conclusive determination of the issue. But the learned judge distinctly ruled and charged the jury that the defendant was in no position to urge the invalidity of the contract under the Statute of Frauds, by reason of his omission to plead that defence, and to the ruling and the charge to the same effect there was an exception. The result in the courts below thus turned upon the omission of the defendant to plead the statute, and the first and perhaps only question presented by the appeal is one of pleading. Preliminary to that question it should be observed that contracts that by their terms are not to be performed within one year were valid at common law, though not in writing, but the statute enacted that thereafter such agreements should be void unless reduced to writing, and, therefore, a new defence was created with respect to such agreements as were within the statute. The Statute of Frauds does not prohibit the making of any

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11 agreement in any way that the parties may see fit nor render them illegal or immoral if not made in some particular way. It simply requires that certain agreements must be proved by a writing. It introduced a new rule of evidence in certain cases without condemning as illegal any contract that was legal before.

[A ruling on the question of a waiver by defendant by failing to object to oral proof of the agreement, is omitted.]

12 But the important question in the case, and upon which we prefer to let the decision rest, is whether, in the light of the adjudged cases, it is not necessary for a defendant who intends to avail himself of the benefit of the statute, as a defence to an action for damages for breach of a verbal agreement, within the statute, to specifically plead it.

It is safe enough to premise that the authorities are not all in harmony on this question any more than they are upon many other questions with respect to the construction and application of the statute itself. In England, under the rules framed in pursuance of the Judicature Act, and in some of our sister States, it is necessary to plead the statute. (Am. & Eng. Ency. 13 of Law, p. 747, vol. 8, note 2; Graffain v. Pierce, 143 Mass., 386; Lawrence v. Chase, 54 Me., 196; Farwell v. Tillson, 76 *id.*, 227; Bird v. Munroe, 66 *id.*, 346; Boston Duck Co. v. Dewey, 6 Gray, 446.)

14 In this State cases may be found where the opinion is expressed that the defendant may avail himself at the trial of the benefit of the statute, under the general issue, by objection to verbal proof of the contract. Some of these cases and, perhaps, the principal ones, have already been cited to show when and how the defendant is deemed to have waived the benefit of the statute by admitting the allegations of the complaint. It is proper, I think, to observe that they are cases where the complaint was admitted in some way or the decision was before the Code or founded upon authority antecedent to it. The recent cases in this court sustain the view that it is necessary to plead the statute. In Porter v. Wormser (94 N. Y., 450), Judge ANDREWS said: "The general rule is that the defence of the Statute of Frauds must be pleaded. * * * It cannot be doubted that if the defendants had brought an action to recover a balance

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claimed to be due on the contract for the purchase of the bonds 15 without disclosing whether the contract was oral or written, the plaintiff would have been bound to plead the statute to avail himself of its protection." In that case the plaintiff had recognized the existence of the contract by bringing an action upon it, and it was held that he was not in a position to question the validity of it under the statute.

In *Hamer v. Sidway* (124 N. Y., 538), the action was against the executors of a deceased person upon a verbal promise to his nephew that he would give him a large sum of money at twenty-one, if in the meantime, he would abstain from 16 the use of liquor, cigars, billiards, etc. The promise was confirmed by a letter from the uncle after the boy became of age. It was insisted that the promise was within the statute. After stating that the deceased had waived the defence by his letter and statements subsequent to the time of performance, the court, PARKER, J., delivering the opinion, said: "Were it otherwise the statute could not now be invoked in aid of the defendant. It does not appear on the face of the complaint that the agreement is one prohibited by the Statute of Frauds, and, therefore, 17 such defence cannot be made available unless set up in the answer." In *Wells v. Monihan* (129 N. Y., 161), the action was upon a written promise to pay the debt of another without expressing any consideration, and it was urged upon the argument here that it was void under the statute. Passing upon that point, Judge FINCH said: "So far as the defence in this case rests upon the Statute of Frauds it must fail for two reasons: No such defence has been pleaded, and it is not raised by the averments of the complaint, and without one or the other of these conditions the defence, if existing, cannot be made avail- 18 able."

Without referring to other cases in which the precise point does not seem to have been discussed or noticed, sufficient appears to show the tendency of late decisions in this court. They announce a rule well settled and familiar in analogous cases. The Statute of Frauds is a shield which a party may use or not for his protection just as he may use the Statute of Limitations, the statute against usury, that against betting and gaming,

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19 and others that might be mentioned. I take it to be a general rule of universal application that the statutes last mentioned are not available to a party unless specifically pleaded, and there is no reason for making the Statute of Frauds an exception to the rule.

20 The present system of procedure is founded upon the idea that litigants should, when possible, know in advance the precise questions they must meet at the trial. When a contract is set out in the complaint as the cause of action, and the defendant intends to assail it on some special or statutory ground, the general spirit of the system is not complied with unless notice is given of this intention to the opposing party by the pleadings.

In the solution of this question the provisions of the Code should not be overlooked. The statute may be used as a defence to actions on certain agreements. A defence must now be presented, either by demurrer or answer. (Code, § 487.)

21 When the defect in the plaintiff's cause of action appears on the face of the complaint, the defence must be interposed by demurrer. (§ 488.) When the complaint does not, as in this case, disclose an invalid agreement upon its face, but it is, in fact, invalid for some reason, the defendant must take the objection by answer (§ 498), and if the objection is not taken in either way the defendant is deemed to have waived it. (§ 499.) The conclusion is thus reached that the defendant waived the benefit of the statute in this case by omitting to plead it.

22 It is claimed by the learned counsel for the plaintiff, that the agreement, as pleaded and proven, was not within the statute, since it amounted to a renting of apartments in a city house for business purposes, with board and lodging added, and was, therefore, good as a verbal lease for one year. (*Blumenthal v. Bloomingdale*, 100 N. Y., 558 ; *Laughran v. Smith*, 75 *id.*, 209 ; *Reeder v. Sayre*, 70 *id.*, 184 ; *Oliver v. Moore*, 53 Hun, 472 ; s. c. *affd.*, 131 N. Y., 589.)

It is unnecessary to consider this question, as the conclusion reached with reference to the question of pleading is fatal to the appeal.

Milbank v. Jones, 127 N. Y., 370.

The judgment should be affirmed.

23

All the judges concurred, except EARL and PECKHAM, JJ., dissenting.

Judgment affirmed.

MILBANK v. JONES.

New York Court of Appeals, Second Division, 1891.

[Reported in 127 N. Y., 370.]

The defence that the contract sued on was illegal and void, if the facts to establish it do not appear in plaintiff's complaint or evidence, cannot avail defendant under a general denial; but must be pleaded.

V

Action to recover money held in trust.

1

The complaint alleged, in substance, that defendant, as trustee for the plaintiff, had received \$5,000, which sum he still continued to hold in trust for plaintiff; that by the terms of the trust plaintiff might terminate it at his election; that plaintiff had caused due notice to be given to the defendant of his election to terminate the trust, and had demanded payment of the \$5,000, which was refused.

2

The answer was a general denial.

Upon the trial, plaintiff put in evidence a document the first part of which, purported to be a resolution directing the Street Commissioner to make a contract for lighting streets, etc., of the city of New York, with gas.

Under this resolution was written the following:

“NEW YORK, June 14, 1866.

3

“Received of R. W. Milbank five thousand dollars (\$5,000), and also certificate for two hundred and fifty (250) shares of the stock of the People Gas Light Company of the City of New York, number seven (7), the said money and stock to be returned to said Milbank in case the resolution above shall not be passed and take effect before the 10th of July next.

It being understood and agreed that said Milbank shall have

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- 4 the right, at his election, in case said resolution shall pass and take effect before the said 10th of July, to purchase back the said stock at any time within sixty (60) days from the time said resolution shall take effect, by paying to me fifteen thousand dollars (\$15,000) therefor; and that he shall on his part be bound to purchase the same and pay said fifteen thousand dollars (\$15,000) therefor, within said sixty (60) days, at my election.

MORGAN JONES.

I assent to and join in the above understanding and agreement.

- 5 New York, June 14, 1866.

R. W. MILBANK."

Plaintiff also introduced a record of the proceedings of the board of aldermen and board of councilmen, and a veto message by the mayor, showing that the resolution did not take effect before July tenth, together with proof that a demand for a return of the money was made prior to the commencement of the action, and rested. Thereupon the defendant made a motion to dismiss the complaint assigning, among other grounds:

- 6 That the contract was void because on its face it appeared that its purpose was to improperly influence legislation. This motion the court denied.

The defendant then offered testimony tending to show that the contract was against public policy, to which evidence plaintiff objected on the ground that it was immaterial, incompetent and inadmissible under the answer, because not pleaded. The objection was overruled, and plaintiff excepted.

At Trial Term defendant had judgment on a verdict.

- 7 *The General Term of the Superior Court* affirmed the judgment, holding that the contract was void on its face as against public policy.

The Court of Appeals reversed the judgment.

PAEKER, J. [after holding that the agreement was not void on its face, as it did not provide that Jones should assist in procuring the passage of the resolution, or perform any services whatever, but made of him a mere depository of the money]: The answer was a general denial, and the plaintiff insisted on the

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trial, as he does on this appeal, that not having been informed 8
by the answer that the illegality of the contract would be an
issue on the trial, he could not be expected to be prepared nor
required to meet it. Under a general denial the rule undoubtedly
is that if the illegality appears on the face of the complaint,
or necessarily appears from plaintiff's evidence, advantage may
be taken of it by defendant, who must also be permitted to
controvert by evidence everything which the plaintiff is bound,
in the first instance to prove, in order to make out his cause of
action. And the cases cited by the respondent in support of the
ruling will be found on analysis to come within it. 9

In *Russell v. Burton* (66 Barb., 539) the contract, as proved
by the plaintiff, was for lobby services, and void.

In *Oscanyan v. Arms Co.* (103 U. S., 261), the complaint was
dismissed on the opening of plaintiff's counsel because it appeared
therefrom that the contract relied on was illegal.

In *Cary v. Western Union Telegraph Co.* (20 Abbott N. C.,
333), the plaintiff, in making proof of his contract, introduced
evidence showing its invalidity.

And in *O'Brien v. McCann* (58 N. Y., 376); *Clifford v. Dam*, 10
(81 *id.*, 52); and *Griffin v. L. I. R. R. Co.*, (101 *id.*, 348), the court
simply declared the rule that, under a general denial, the de-
fendant may give evidence tending to disprove any fact which
the plaintiff is bound to prove in order to recover. But in this
case it neither appeared from the complaint or the evidence pre-
sented by the plaintiff that the contract was illegal, and as we
have already shown when the plaintiff rested the evidence
established a cause of action. The general denial put in issue
all matters which the plaintiff was bound to prove; nothing
more. He was required to prove the contract entered into by 11
defendant which was, on its face, valid. Having accomplished
that he could not be compelled to enter into a controversy over
matters not appearing in the contract involving the question of
its validity or invalidity because he had not been notified by the
answer that the defendant proposed to assert his own participa-
tion in that which was a violation of law as a shield against the
consequences of his agreement.

This rule has been enforced so long that it seems unnecessary

Wallace v. Blake, 128 N. Y., 676.

- 12 to support it at this time by an extended reference to the decisions and we shall, therefore, end the discussion by citing a few of the cases in which the courts of this State have said that a defendant, in order to avail himself of facts not appearing on the face of a contract to establish its invalidity, must plead it. (*Dingeldein v. Third Ave. R. R. Co.*, 37 N. Y., 575; *Goodwin v. Mass. Mut. Life Ins. Co.*, 73 *id.*, 480; *May v. Burras*, 13 Abb. N. C., 384; *Haywood v. Jones*, 10 Hun, 500; *Schreyer v. Mayor*, etc., 7 J. & S., 1; *Vischer v. Bagg*, 21 Weekly Digest, 399; 13 *Honegger v. Wettstein*, 94 N. Y., 252.)

The judgment should be reversed.

All the judges concurred.

Judgment reversed.

WALLACE v. BLAKE.

New York Court of Appeals, 1891.

[Reported in 128 N. Y., 676.]

1. A subsequent modification of the agreement set out in the complaint cannot be shown under a general denial.*
2. In an action to recover a balance due for goods sold, after it has been shown by uncontradicted evidence that defendants purchased, received and disposed of the goods, the defendants cannot, under a general denial, show that after their receipt and acceptance of the goods, they complained of their quality, and it was then arranged that they should be considered as having received the goods as plaintiffs' agents for sale; nor that defendants rejected the goods because of inferior quality.

* In an action upon a contract, where the complaint sets out only part of the agreement, omitting another part which materially qualifies the agreement as set out, under a denial that the agreement was as set forth in the complaint, the defendant is entitled to read in evidence the part which has been omitted.

In an action to recover royalties alleged to be due upon the manufacture and sale of a patented article, under a license or agreement,—*Held*, that the defendant, under a general denial, may read in evidence another instrument made between the same parties, at the same time, in reference to the same subject matter, so as in reality to form a part of the agreement set forth in the complaint, whereby the amount of the royalties were materially reduced. *Marsh v. Dodge*, 66 N. Y., 533.

Wallace v. Blake, 128 N. Y., 676.

The complaint, after alleging partnership of the parties 1
respectively, proceeded :

III. That on or about the 3d day of March, 1886, the plaintiffs delivered to defendants, at their request, a quantity of yarn of the agreed price or value in the money of Great Britain of £810, as further shown on the statement hereto annexed and marked Exhibit A.

[Four more sales of yarn on different dates were similarly alleged, various payments made by the defendants were admitted, and a balance of \$1,979 was alleged to be payable to plaintiffs.] 2

The defendants denied any knowledge or information sufficient to form a belief as to the allegations covering the sales, and denied the allegations covering the payments by them and the balance due.

At the trial, plaintiffs proved the sale, delivery and acceptance of the goods, by undisputed evidence. The defendants then offered to show that after the sale and delivery of the yarn to them they complained to the plaintiffs of the quality thereof, 3
and that then it was arranged that they (defendants) should be considered as having received the yarn as consignees, and that they were to sell it for and on account of the plaintiffs.

The Court of Appeals held that the trial judge had properly excluded such a defence on the ground that it was not pleaded.

EARL, J. *[after stating the facts]* : It was an affirmative defence which, according to elementary rules of pleading, could not be shown under the denials in the answer.

The defendants claim that they had the right to prove under 4
their denials that they had not accepted the yarn. But the uncontradicted evidence shows that the yarn was purchased by them of the plaintiffs' manufacturers in England; that it was shipped to them as purchasers from England, and was taken, received and disposed of by them, and all this shows a legal acceptance of it by them. Their claim, however, is that after the yarn was delivered to them it was arranged that they should hold and sell it as consignees, and that thus they rejected it as

 Sprague v. Sprague, 80 Hun, 285.

5 purchasers. But they had no right to assert this claim under their answer.

To the defendants' claim that after they had purchased the yarn, and it had come into their possession and control as the purchasers, they rejected it because of its inferior quality, the answer again is that no such defence is alleged, and that there is no allegation in the answer that this yarn was in any respect
6 inferior or defective.

The reply to this answer contains no allegations or admissions which can cure the defective answer or enlarge its scope.

The judgment should be affirmed, with costs.

SPRAGUE v. SPRAGUE.

New York Supreme Court, General Term, Second Department, 1894.

[Reported in 80 Hun, 285.]

1. To a complaint on a promissory note an answer which denies the making and delivery of the note and any indebtedness thereon is in effect a general denial.
2. A promissory note, whether it expresses value received or not, imports a consideration, and the burden as to consideration is upon the defendant.
3. If the answer does not allege want of consideration, that defence cannot be proved.

1 This action was brought upon a promissory note made by defendant's intestate.

The answer denied the making and delivery of the note, and any indebtedness thereon.

BROWN, P. J. The main question of fact litigated upon the trial was as to the authenticity of the note, and the verdict of the jury has, upon ample testimony, determined that question in the plaintiff's favor. The question of consideration did not arise
2 upon the pleadings. The answer was in effect a general denial, and that put in issue all facts which plaintiff was bound to prove to make out his cause of action. (*Milbank v. Jones*, 141 N. Y., 340; s. c., p. 483 of this vol.)

Note on the Effect of a Denial.

A promissory note, whether it expresses value received or not, imports a consideration, and the burden rests upon the defendant to prove the fact otherwise. (Carnwright v. Gray, 127 N. Y., 92; s. c., p. 58 of this vol.) 3

As the answer did not plead that defence, the court was correct in its charge that there was no question of that kind in issue. The fact that the payee of the note was the maker's mother did not take the case out of the operation of the rule cited.

[*A ruling on a point of evidence is here omitted.*]

BAUMILLER v. WORKINGMAN'S CO-OPERATIVE
ASSOCIATION.

New York Common Pleas, General Term, 1894.

[Reported in 9 Misc., 157.]

The objection that the action has been prematurely brought, unless the fact appears on the face of the complaint, is an affirmative defence, and not available under a general denial.

In an action on a policy of insurance in the Workingman's Co-operative Association, for "sick benefits," the defendant objected that the action was brought prematurely, because before the expiration of the thirty days allowed by the policy. 1 ✓

Held, the fact is not apparent, and it was an affirmative defence of which the appellant could not avail himself under his general denial.

NOTE ON THE EFFECT OF A DENIAL.

The code procedure requires allegations and denials to relate to matters of fact, and, although not dispensing entirely with conclusions, such as give character to the intention of the pleader, yet deprives conclusions of all controlling force as elements in the issue joined. Hence the test as to what may be proved under a traverse of the plaintiff's pleading is quite different from that applicable at common law. The result of a general traverse at common law varied in different forms of action and different 1

Note on the Effect of a Denial.

- 2 forms of the plea. The commonly stated rule (particularly applicable in assumpsit) was that the general issue let in evidence of anything to show that plaintiff never had a cause of action and any evidence in mitigation of damages. Under the Code the rule as commonly stated is that a general denial lets in any evidence tending to controvert what the plaintiff is bound to prove in the first instance to make out his claim. *Griffin v. Long Island R. R. Co.*, 101 N. Y., 348.

- The test may be more precisely stated thus: If you desire to give evidence as to a new fact not indicated in the complaint, for the sole purpose of negating something that is alleged in the complaint and with which your new fact is inconsistent, a mere denial of plaintiff's allegation lets in that evidence; and, on the other hand, a statement of that new
- 3 fact in the answer without denying plaintiff's allegation, will not let it in.

But if you desire to prove a new fact, not for the purpose of negating plaintiff's complaint, but for the purpose of putting this new fact along with those he has alleged, so as to show that on the whole case he is not now, or even that he never was, entitled to recover, the new fact must be pleaded and cannot be given in evidence under the denial.

- For instance, if the plaintiff alleges that the defendant wrongfully entered upon plaintiff's premises to his damage, etc., the ownership and the entry are matters of fact; the "wrongfully" is a conclusion. If it be desired to prove that the premises belonged to some one else merely for the purpose of negating plaintiff's claim of ownership, this is competent
- 4 under a denial. If it be desired to prove that defendant was in another place, that the entry was made by some third person, this, since it tends to negative plaintiff's allegation that defendant entered, may be proved under a denial; and an allegation that the entry was made by a third person without denying that defendant made it, would not let in evidence of entry by the third person. On the other hand, if the object is to put, along with plaintiff's allegation of ownership and entry, another fact such, for instance, as previous license from the plaintiff, or that defendant was a sheriff with an execution, etc., so as to show that plaintiff never had a cause of action, these are not admissible under a denial because they do not tend to negative plaintiff's facts, but only his conclusion. See, for instances *American Tool Co. v. Smith*, 1 State Rep., 761; *Wehle v. Butler*, 12 Abb. Pr. N. S., 139; s. c. 35 Super. Ct. (J. & S.), 1; *Pier v. Finch*, 29 Barb., 170; *Beaty v. Swarthout*, 32 Barb., 298; *Wilson v. Manhattan Ry. Co.*, 2 Misc., 127; s. c. 49 State Rep., 116; 20 N. Y. Supp., 852; *Brown v. Chadsey*, 39 Barb., 258.
- 5

The same principles apply to causes of action on contract, as well as to those on tort; and it is upon this principle that a modification of the contract alleged, or payment, or release, or an excuse for breach, or an assignment by plaintiff of his cause of action, or any other new fact which, though it may negative the conclusion, does not negative the allegations from which plaintiff seeks to draw that conclusion, must be pleaded by the defendant; while a materially different version—as, for instance, of

 Note on Putting Corporate Existence in Issue.

the contract alleged by plaintiff, or of the supposed defamatory words charged by him to have been spoken, or any other fact absolutely inconsistent with any of his essential allegations—may be proved under a denial. 6

NOTE ON PUTTING CORPORATE EXISTENCE IN ISSUE.

Code Civ. Pro., § 1776 : “In an action brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation.” 1

This section applies to foreign as well as to domestic corporations. *Vulcan v. Myers*, 58 Hun, 161; *McElwee Mfg. Co. v. Trowbridge*, 68 *id.*, 28.

The following allegations have been held *insufficient* to raise an issue :

“Upon information and belief they deny the plaintiff ever was or now is a corporation.” *Vulcan v. Myers*, 58 Hun, 161. Defendant “has no knowledge or information sufficient to form a belief” as to the organization of plaintiff as a domestic corporation, *Concordia Sav. and Aid Ass. v. Read*, 98 N. Y., 474 ; as a foreign corporation, *McElwee Mfg. Co. v. Trowbridge*, 68 Hun, 28. 2

“The defendant denies on its information and belief that at the time mentioned in the complaint, or at any other time, the defendant was a foreign corporation, as is alleged in the complaint.” *Bengston v. Thingvalla S. S. Co.*, 31 Hun, 96.

“For a second and separate defence, the defendant alleges on information and belief that it is not and never was a corporation.” *Bengston v. Thingvalla S. S. Co.*, 3 Civ. Pro., 263 ; *aff’d* in 31 Hun, 96 without passing on this defence. The Court (BROWN, J.) was of opinion that a party intending to raise the issue should be held to a positive allegation ; at least such should be the rule where a company, holding itself out to the world as a corporation, denies its own existence.

But so far as the opinion indicates that an allegation that defendant is not a corporation is not an “affirmative allegation,” if made on information and belief, it is not in harmony with settled usage, for an affirmative as well as a negative allegation may be either positive, or on information and belief. 3

See Note on THE EFFECT OF DENIALS, p. 489 of this vol.

[*Voluntary Association.*] Where, under Code Civ. Pro., § 1919, an action is brought by the president or treasurer on behalf of the association, an allegation in the complaint “that the Racket Club is a joint-stock company or association, consisting of more than seven shareholders or associates” is put in issue by a simple denial. *Tiffany v. Williams*, 10 Abb. Pr., 204.

Walker v. The Granite Bank, 1 Abb. Pr. (N. S.), 406.

WALKER v. THE GRANITE BANK.

Supreme Court, First District, Special Term 1865.

[Reported in 1 Abb. Pr. (N. S.), 406.]

1. In an action to recover securities pledged, on the ground that the amount for which they were pledged had been paid, an answer alleging that the amount had not been paid, but that a large sum still remains unpaid, is not obnoxious to a motion to make it more definite and certain. A simple denial that all the money for which the securities had been pledged had been paid would have been enough.
 2. Where an amended complaint is served in pursuance of leave given by the court, a new answer becomes necessary; and the time within which to move to compel an amendment of the answer runs from the time of filing it.
- 1 Motion by plaintiff to require the defendants' answer to be made more definite and certain.

INGRAHAM, P. J. The portion of the answer which sets out special causes why the gratuity was not voted by the directors, should not have been inserted in the answer. The general allegation that the services were of no value to the defendants is proper, but all the rest is mere evidence to prove the truth of the foregoing allegation.

- 2 The application to have the defendant state in the answer how much is due to the defendants from Holbrook, is denied. It is very immaterial what the amount is. The plaintiff claims to recover the securities on the ground that the amount for which they were pledged had been paid in part by collections and in part by sales. The defendants answer that the amount has not been paid, but that a large sum still remains unpaid. I do not think the plaintiff has any right to require this allegation to be
- 3 made more specific by stating the amount actually unpaid. That must be matter of proof on the trial. The issue could have been as well formed by a simple denial that all of the moneys for which the securities had been pledged were paid to the defendants.

The objection that it is too late to make the motion is not well taken. The leave to serve an amended complaint destroyed the

White v. Drake, 8 Abb. N. C., 188.

further pleadings, and rendered a new answer necessary. The 4
time within which to move to amend the answer runs from the
filing of it.

Motion granted in part, as above stated.

WHITE v. DRAKE.

*New York Supreme Court, First Department, Special Term,
1877.*

[Reported in 8 Abb. N. C., 188.]

A defence merely alleging that plaintiff is not the real party in interest,
but that W. is, is demurrable; because it attempts to set up new 4
matter which could not be proved unless specially pleaded, and states
no fact, but only a conclusion of law.

Demurrer to a portion of an answer.

1

Plaintiff sued as assignee of several choses in action, alleged
to have been assigned by one Robert Woodruff. Defendant, as
his fourth defence, alleged as follows: "Defendant for a
further and separate defence, alleges on his information and
belief that the plaintiff is not the real party in interest, but that
said Woodruff is the real party in interest."

To this part of the answer plaintiff demurred on the ground 2
that it was insufficient in law upon its face, and constituted no
answer or defence to the complaint or any part thereof.

BARRETT, J. I.—The answer is demurrable. It attempts to
set up new matter; that is, matter which could not be proved
under a denial nor unless set up. (*Jackson v. Whedon*, 1 E. D.
Smith, 142; *Savage v. Corn Ex. Fire Ins. Co.*, 4 Bosw., bottom
of page 15, and top of page 16.)

II.—And it is bad on demurrer, for the reason that no fact is 3
stated—nothing but a conclusion of law. The action must of
course be prosecuted in the name of the real party in interest,
but whether it is so prosecuted depends upon the facts. (*Russell
v. Clapp*, 3 Code R., 65; *Bentley v. Jones*, 4 How. Pr., 204;
Brown v. Ryckman, 12 How. Pr., 314; *Witherspoon v. Van*

IN SENATE
JANUARY 10, 1906

REPORT
OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
JANUARY 10, 1906

ALBANY:
J. B. LEECH, PRINTER
1906

THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE COMMISSIONERS OF THE LAND OFFICE IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE JANUARY 10, 1906. THE REPORT IS HEREBY SUBMITTED TO THE SENATE FOR ITS CONSIDERATION.

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Traver v. Eighth Ave. R. R. Co., 4 Abb. Ct. of App. Dec., 421.

how much she could earn per week, prior to the injury, and that some money had been expended in taking care of her the last year preceding the trial. 2

Defendants moved to dismiss the complaint, on the ground, among others, that the action was improperly brought in plaintiff's maiden name, instead of the name acquired by marriage. The motion was denied.

It appeared that an action had been previously brought by plaintiff's mother, and a recovery had for loss of plaintiff's services, and the expense of taking care of her.

The court charged the jury that nothing could be recovered for those causes in the present action. Plaintiff recovered. 3

The Superior Court at Special Term, denied a motion for a new trial.

The General Term affirmed the judgment.

The Court of Appeals affirmed the judgment.

GROVER, J. Commencing the action in the maiden name of the plaintiff, instead of that acquired by marriage, was a misnomer merely. There was no pretence but that the plaintiff was the proper person to sue, and the only one that could maintain an action for the injury sought to be redressed. Under the practice prior to the Code, misnomer of either party could only be pleaded in abatement of the action (2 Grah. Pr., and cases cited). Neglecting to interpose such plea waived any advantage to the defendant therefrom. The mistake was amendable by the court. The misnomer was not ground of non-suit upon the trial. It was not like the case of bringing an action by the wrong party; that was ground of non-suit. By the Code, pleas in abatement are abolished (Code, §§ 142-151). The only mode of presenting such a defence is, under the Code, by answer. No such defence is set up in the answer in the present case. It was, therefore, unavailable upon the trial. In *Bank of Havana v. Magee* (20 N. Y., 355), it was held that although there was no such corporation, and that it was only a name assumed by Charles Cook for the transaction of his banking business, yet bringing the action by Cook in such name was but a mere formal error, 4 5

Traver v. Eighth Ave. R. R. Co., 4 Abb. Ct. of App. Dec., 421.

- 6 amendable in the courts of original jurisdiction, and to be disregarded in this court.

That case goes much further than it is necessary to go in the present. In that case, upon the papers, it would appear that the action was brought by a corporation, and not by Charles Cook, while in the present the plaintiff was the same, whether called by the married or maiden name.

- 7 The evidence of what the plaintiff could earn before the injury, was held by the judge not to be material, and the jury were instructed not to give any damages for loss of services, inasmuch as the plaintiff's mother had previously recovered therefor. This direction would not have cured the error (if one was committed), in receiving the evidence, if that was such as was calculated to create a prejudice in the minds of the jury, and influence them in fixing the amount of damages, unless it appeared, from the whole case, that the jury were not so influenced (*Erben v. Lorillard*, 19 N. Y., 299). The evidence in the present case was not likely to influence the jury upon the question of damages, unless they were convinced that the injury of
- 8 the plaintiff was of a character to prevent her from attending to her business after she was twenty-one; and, if so convinced, the evidence was proper for the consideration of the jury. When a child under twenty-one is injured, the parent can recover for loss of service until the arrival of the child to that age; and, if the disability continues beyond that time, the child may recover for the loss. Upon this point, the case was tried as favorable to the defendants as the law required. No claim for loss of service was made by the plaintiff after she was twenty-one; and the jury were told that the mother had recovered for such loss up to
- 9 that time. No ground of objection to the proof of what the expense of taking care of the plaintiff had been, was stated. The exception to the proof does not, therefore, raise any question for the consideration of this court. The judgment appealed from must be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

Wiegand v. Sichel, 4 Abb. Ct. of App. Dec., 592.

WIEGAND v. SICHEL.

New York Court of Appeals, 1866.

[Reported in 4 Abb. Ct. of App. Dec., 592.]

1. In an answer alleging a defect of parties, defendant must state precisely and truly who are the parties lacking, and an error wholly vitiates the defence. Thus in an action for goods sold, an answer that A and B were partners with defendant and should have been joined, is not sufficient to admit proof that A was a partner.*
2. The rule requiring the production of a subscribing witness to prove the execution of an attested instrument is not affected by the Code.†
3. Where the making of a contract giving credit is induced by fraud, the creditor may sue upon the implied agreement founded on the consideration of the contract, and may prove the fraud under the ordinary complaint for goods sold, etc., for the purpose of avoiding the stipulation as to credit.

Action for goods sold.

1

The original complaint contained two counts, one for goods sold, the other for the value of the same goods obtained by fraud and converted. The court ordered the plaintiffs to elect between these counts, and they amended by striking out the latter count. The complaint, as amended, was the ordinary one for goods sold and delivered.

The defendants pleaded a non-joinder of George Mann and Adolphus Knorr, as co-defendants; also, that the goods had been purchased on a credit, which had not yet expired, and that they had given their promissory notes to the plaintiffs for the amount of the purchase.

2

On the trial, the plaintiffs proved the sale and delivery of the goods on a credit of four months, for which the defendants gave their own promissory notes; the plaintiffs also proved that the

* In *Palmer v. Field*, 76 Hun, 229, defendant was sued as an indorser of several notes. The answer alleged that the notes were joint obligations of the indorsers thereon whose names were given, and upon the trial, defendant was allowed to amend his answer by setting up that the failure to join such persons was a defect of parties defendant.

Held, the plea was not sufficient to raise the defence. "To make a plea in abatement good, when it is based on the non-joinder of a party defendant, the plea must aver that the person not joined is alive and within reach of the ordinary process of the court."

† It is modified by L. 1883, p. 200, c. 195, which provides that it is not necessary to call the subscribing witness, except in the case of written instruments to the validity of which one or more may be necessary.

Wiegand v. Sichel, 4 Abb. Ct. of App. Dec., 592.

- 3 credit was obtained upon representations grossly false and fraudulent; that they had, in vain, sought the defendants, to offer a return of the notes before suit commenced; and that the defendants fraudulently concealed themselves; and they produced and offered to cancel the notes on the trial. The plaintiffs recovered at the Circuit.

- The Supreme Court* held that under an allegation that two persons were partners with the defendants, articles of co-partnership showing that one of them was, were inadmissible; that the
4 rule requiring the production of subscribing witnesses is not modified by the Code; and that on the authority of *Roth v. Palmer*, 27 Barb., 652, plaintiffs might disregard the express agreement for a credit and recover immediately on the implied agreement. Reported in 34 Barb., 84.

The Court of Appeals affirmed the judgment.

- HUNT, J. [*after stating the facts*]: The appellants' points present three grounds of objection, which I will consider in the order in which they are presented. It is claimed that an error
5 was committed in excluding the proof of certain articles of co-partnership, entered into on April 20, 1858, between Max Sichel, Solomon Sichel and George Mann. As a part of their answer, the defendants had pleaded, that the supposed promises, in the complaint set forth, if any such were made, were made jointly, with George Mann and Adolphus Knorr, and not by the defendants alone; and they prayed that the plaintiffs' action might abate, on account of the non-joinder of said Mann and Knorr. On the trial, the defendants offered in evidence the
6 articles of co-partnership mentioned, to sustain this defence in abatement. It was excluded by the judge. A plea in abatement that Knorr and Mann were co-partners, and should have been co-defendants, was not sustained by evidence that Mann was such partner. The defendant, by his plea, must give the party a better writ; that is, he must state precisely and truly who were the parties to the contract; and if he fails to do this, his plea fails also. To sustain the plea, it must appear that there is neither a greater nor less number of parties than is set up in the plea (*Hawks v. Munger*, 2 Hill, 200). The paper was not

Wiegand v. Sichel, 4 Abb. Ct. of App. Dec., 592.

offered in connection with evidence to prove that Knorr was also a partner; and, indeed, it was explicitly proven by Knorr that he never had been a partner in the business. There was no error in this ruling, and this, independently of the question of the incompetency of written articles to prove the fact alleged. 7

The defendants afterward offered in evidence a release, signed by Max Sichel and Adolphus Knorr, reciting a former partnership between them, and mutually releasing each from all claims in favor of the other. This paper was signed by John Herts, as a subscribing witness, and the plaintiffs objected to its admission, unless proved by the subscribing witness. The law on this point remains unchanged, and the objection was undoubtedly valid. There was no error of the judge in excluding this paper. If admitted, the release could have had no possible effect. It did not relate a partnership of Knorr with Max Sichel and Solomon Sichel, but with Max Sichel alone. This could not have been in reference to the partnership sued, as to which it was admitted, by the pleadings, that Solomon was a member. If it was intended that the paper should connect Knorr as a partner of the firm sued, it could have no such effect, and was quite immaterial. 8 9

The last objection urged by the defendants is upon the form of the action. The complaint, as amended, was in the ordinary form for goods sold and delivered, and a cause of action was proved in the manner and of the character I have already stated. The defendants now object that, upon these pleadings, it was error to allow the plaintiffs to prove a fraud, for the purpose of avoiding the contract upon which they had counted.

It is settled by numerous authorities, that, under the circumstances existing in this case, the plaintiffs were not bound to bring an action for the deceit, or an action of trover or replevin, but could waive the tort and bring assumpsit at once for the value of the goods. *Roth v. Palmer*, 27 Barb., 652; *Masson v. Bovet*, 1 Denio, 69; *Osborne v. Bell*, 5 *id.*, 370; *Kingman v. Hotailing*, 25 Wend., 423. 10

It is not accurate to say that the plaintiffs sought to avoid the contract of sale. It is the credit, only, that is sought to be avoided. It was the sale of goods which the plaintiffs, by

Thompson v. Halbert, 21 Abb. N. C., 266.

- 11 their action, affirmed. It was, however, a sale where the credit was obtained by fraud, and, in law, amounted to a sale for cash. In stating it in their complaint, therefore, to be a sale, and for cash, the plaintiffs but stated the contract according to its legal effect. They did not seek to avoid the contract of sale. They endeavored, merely, by proof of the act of fraud, to reduce the transaction to a cash sale. The complaint and the proof were to the same purport.
- 12 The judgment should be affirmed.
A majority of the judges concurred.
Judgment affirmed, with costs.

THOMPSON v. HALBERT.

New York Court of Appeals, April, 1888.

[Reported in 21 Abb. N. C., 266; rev'g 40 Hun, 536.]

1. If the answer does not state that new matter therein pleaded is set forth as a partial defence, the plaintiff has the right to assume, and the court must assume, that it is pleaded as a complete defence; and upon demurrer it must be tested as such.
 2. It is not a complete defence to an action for the conversion of a promissory note that the statute of limitations has barred an action on the note itself. A plea of the statute as having barred the chose in action converted, tacitly admits the cause of action for conversion and questions only the extent and amount of damages, and is not a bar to a recovery.
 3. In an action for the conversion of a promissory note, if proof of the fact that an action thereon is barred by the statute of limitations is admissible at all, it may be proved under a general denial, since the plaintiff must prove the value of the note as the basis of his recovery, and the defendant may prove any facts which affect its value, even to the extent of reducing the recovery to merely nominal damages.
- 1 Demurrer to the seventh defence set forth in the answer.

The first cause of action was for the conversion of a note secured by mortgage upon land in Kansas, dated in 1871, and the complaint alleged that the note was worth its face value the sum of \$300 and interest thereon from its date at 12 per cent per annum.

The answer contained nine defences, the seventh defence

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alleging, "as a further answer to the first cause of action," that 2
by the laws of Kansas, where the maker of the note and mort-
gage resided and where the land mortgaged was located, the
note and mortgage were "barred by the statute of limitations,"
and that "no action can now be maintained nor any recovery
had thereon."

To this defence the plaintiff demurred, "upon the ground
that it is insufficient in law upon the face thereof."

The Special Term of the Supreme Court sustained the de-
murrer, holding that the matter alleged was a partial defence 3
only, which, by Code Civ. Pro., § 508,* must be expressly stated
to be such, and being pleaded as an absolute defence was de-
murrable.

The General Term reversed the decision below and overruled
the demurrer, holding that as no informality in the manner of
presentation of the defence was stated in the demurrer, nor could
be under Code Civ. Pro., § 508, the only question on the de-
murrer was whether the matter demurred to was sufficient as the 4
statement of an entire or partial defence; and that if the note
should be proved to be of no value by reason of the statute of
limitations, then the answer contained a complete defence, while
if it should be shown or considered to be of some value, then the
answer contained a partial defence (Decision reported in 40 Hun,
536).

From the interlocutory judgment and order of the General
Term plaintiff appealed.

The Court of Appeals reversed the judgment.

FINCH, J. This action was brought to recover damages for 5
the conversion by the defendants of two notes and the mortgages
which secured them. The first cause of action pleaded, respects

* Code Civ. Pro., § 508. A partial defence may be set forth, as pre-
scribed in the last section; but it must be expressly stated to be a partial
defence to the entire complaint, or to one or more separate causes of action
therein set forth. Upon a demurrer thereto, the question is whether it is
sufficient for that purpose. Matter tending only to mitigate or reduce
damage, in an action to recover damages for the breach of a promise to
marry, or for a personal injury or an injury to property, is a partial
defence within the meaning of this section.

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6 a note and mortgage upon land in Kansas, dated in 1871, and as an answer to that the defendants alleged in their seventh defence that by the laws of that State in which the maker of the note resided and the land was located, the note and mortgage were barred by the statute of limitations, and that no action could now be maintained thereon. To this answer the plaintiff demurred on the ground that it was insufficient in law on the face thereof. The demurrer was sustained by the Special Term, but that decision was reversed by the General Term on appeal.

7 We are of opinion that the reversal was erroneous. The facts stated in the answer were not pleaded as a partial defence or in mitigation of damages. Where that is attempted the Code explicitly requires that the answer shall so state, and give notice that the facts relied upon are intended as a partial defence (Code Civ. Pro., § 508). When no such statement is made the plaintiff has the right to assume, and the court must assume, that the new matter alleged is pleaded as a complete defence, and if demurred to must be tested as such (*Matthews v. Beach*, 5 Sandf., 256; s. c. 8 N. Y., 173).^{*} Applying that test, the answer is insufficient.

8 It merely affects the amount of damages to be recovered by tending to reduce the value of the securities converted.

It confesses but does not avoid. It admits the cause of action and questions only its extent and amount, and is not a bar to recovery. It is bad, therefore, as a defence, and the Special Term was right in so holding.

It is not denied that the facts alleged, if admissible at all, may nevertheless be put in evidence for the purpose of affecting or reducing the value of the securities (*Booth v. Powers*, 56 N. Y., 22). So far as the question of pleading is concerned, they are

9 admissible under the denials of the answer. The plaintiff must prove the value of the articles converted as the basis of his recovery, and what he may prove the defendants, denying, may disprove. The plaintiff averred the value of the note to be \$300, and the accrued interest at 12 per cent. The defendants deny

^{*}The decision in 8 N. Y. was on appeal from final judgment after trial had, in which the interlocutory judgment on demurrer, which was affirmed in 5 Sandf., was also brought up for review and the decision approved, though the final judgment was reversed for error at the trial.

Simmons v. Simmons, 21 Abb. N. C., 469.

that allegation, and aver that the same had no value, and also¹⁰ deny the alleged conversion. While the allegations of value and no value may perhaps not make a technical issue, because needless, yet under the denial of the answer, which puts in issue plaintiff's whole cause of action, the defendants have a right to prove any facts which affect the value of the securities, and possibly to an amount which would reduce the recovery to merely nominal damages; and so, as a question of pleading, and although the seventh defence be stricken out, may prove the law of Kansas and show the difficulty and uncertainty of collection (Knapp v. Roche, 94 N. Y., 329, 333). So much the plaintiff¹¹ concedes. Precisely what useful purpose was served by interposing this demurrer it is therefore difficult to see, but the question is raised and must be correctly decided.

The argument of the General Term appears to be that the facts pleaded might induce the jury to find that the securities converted were absolutely valueless, and so the defence become a complete one. It would be more correct to say that the damages would become merely nominal although the conversion would remain and the wrong itself be undefended. An answer¹² does not bar a cause of action and so constitute a defence when it affects merely the measure of damages.

The judgment of the General Term should be reversed, and that of the Special Term affirmed with costs, but with leave to the defendants, upon payment of costs of the demurrer, to plead anew or amend within twenty days after entry and notice of this judgment.

All concurred.

SIMMONS v. SIMMONS.

New York Supreme Court, Chambers, 1888.

[Reported in 21 Abb. N. C., 469.]

Where portions of an answer as pleaded do not set up a complete defence to the cause of action contained in a complaint, and the pleader omits to state that the defence is pleaded as a partial defence, an order will be granted requiring the defendant to make those allega-

Simmons v. Simmons, 21 Abb. N. C., 469.

tions more definite and certain, so that it will clearly appear whether such paragraphs are intended as a complete or partial defence. Hence in an action for alienating the affections of a husband, allegations of his previous divorce, or of previous separation, should be stated as a partial defence.

- 1 Motion to make allegations in an answer more definite and certain.

Action for damages for alienating the affections of the plaintiff's husband.

- The complaint, after stating plaintiff's marriage in 1857, and subsequent harmonious relations with her husband, alleged that defendant, in 1873, began to alienate plaintiff's husband's affections, and set forth facts showing improper relations of her husband and the defendant; plaintiff's frequent forgiveness
2 of her husband; his desertion of her in 1882; and his marriage in Massachusetts with the defendant after he had pretended to have obtained a divorce from plaintiff in Rhode Island.

The defendant's answer (1) admitted plaintiff's marriage, and (2), denied each and every other allegation of the complaint; and then alleged as follows:

- III. Said defendant further claims that on the — day of November, 1887, a decree of judgment of divorce was duly
3 granted to the said Abram G. Simmons against the plaintiff by the Supreme Court of the State of Rhode Island.

IV. And previously thereto and on or about the — day of September, 1887, the said plaintiff and Abram G. Simmons, agreed together to live separate and apart, and the plaintiff was paid \$5,000 in consideration of said agreement.

- The plaintiff then moved for an order: First, that paragraphs III. and IV. be struck out as redundant, and in the event of
4 such application being denied, then, second, for an order that the allegations of said paragraphs and each of them be made so definite and certain as to make the precise meaning and application thereof apparent; and third, for leave to reply or demur to the matters or any of them set forth in said two paragraphs or either of them.

This motion was made more than twenty days after answer served.

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ANDREWS, J. It is entirely clear that neither paragraph III. 5
nor paragraph IV. of the answer, as pleaded, sets up a complete
defence to the cause of action contained in the complaint.

Section 508 of the Code authorizes a partial defence to be
pleaded, but provides that "it must be expressly stated to be a
partial defence," and if either or each paragraph was intended
as a partial defence, the pleader has not complied with the pro-
visions of said section.* If it was intended in said paragraphs to
plead facts which would go in mitigation of damages, it should
have been so stated.

Under these circumstances, I think the plaintiff is entitled to 6
an order requiring the defendant to make the allegations of
said paragraphs more definite and certain, so that it will clearly
appear whether such paragraphs are intended as defences or
partial defences or as matter in mitigation of damages.

The order may provide that if an amended answer is not
served within ten days, such paragraphs shall be stricken out;
also that if the matter contained in said paragraphs is pleaded as
defences or partial defences, plaintiff may demur within twenty
days. 7

As such defences or partial defences would not constitute
counterclaims, and as a reply to new matter in an answer, not
constituting a counterclaim, cannot be directed under section
516 of the Code, upon the plaintiff's application, the order will
not authorize plaintiffs to reply.†

The motion was not made within the twenty days prescribed
by rule 22,‡ and no costs will be granted to either party.

The order will be settled on notice.

* See *Thompson v. Halbert*, p. 500 of this vol.

† Section 516 provides that where an answer contains new matter, con-
stituting a defence by way of avoidance, the court may, in its discretion,
on the defendant's application, direct the plaintiff to reply to the new
matter. In that case, the reply and the proceedings upon failure to reply,
are subject to the same rules as in the case of a counterclaim.

‡ Supreme Court Rule 22: Motions to strike out of any pleading, mat-
ter alleged to be irrelevant, redundant or scandalous, and motions to
correct a pleading on the ground of its being "so indefinite or uncertain,
that the precise meaning or application is not apparent," must be noticed
before demurring or answering the pleading, and within twenty days
from the service thereof.

President, etc. of Union Bank v. Crine, 21 Abb. N. C., 146.

PRESIDENT, ETC. OF UNION BANK v. CRINE.

U. S. Circuit Court, Southern District of New York, 1888.

[Reported in 21 Abb. N. C., 146.]

1. The principle that an equitable defence is not available in an action in a court of the United States, on a cause of action of a legal nature,* does not exclude such defences, founded on the equities of suretyship, as courts of law have borrowed from courts of equity, in a case where available without injunction or other characteristically equitable procedure.
 2. Nor does it exclude a defence consisting of allegations of fact available at law, merely because the answer demands specific relief, such as surrender and cancellation.
 3. In an action by indorsee against maker, an answer that the note was accommodation paper made by defendant for the payee's accommodation, and indorsed by the payee to the plaintiff, under an agreement between all three that the paper so made and indorsed should be enforced solely against the indorser, is a legal defence, and, it seems, not inconsistent with the note, and sufficient if substantiated.
 4. Mere notice to the bona fide holder of negotiable paper who took it for value before maturity, that it was made for the accommodation of the indorser, does not prevent him from compromising with the indorser, and after discharging him, recovering the residue of the accommodation maker.
- 1 Motion for a new trial, after verdict for plaintiff, by direction of the court.

The facts are sufficiently stated in the opinion.

SHIPMAN, J. This is a motion for a new trial in an action at law, in which a verdict was directed for the plaintiff.

2 The suit was to recover the amount due upon six negotiable promissory notes, all made by the defendant to the order of the Valley Worsted Mills, a corporation which indorsed them for value, and before maturity, to the plaintiff, a bona fide holder, which discounted them for the benefit of the payee.

The suit was originally brought in a State court, where an answer was filed. No additional or new pleadings were made

* *Montejo v. Owen*, 5 Abb. N. C., 110.

President, etc. of Union Bank v. Crine, 21 Abb. N. C., 146.

after its removal to this court. The portion of the answer which is now material is, in substance, that the said notes were made by the defendant purely for the accommodation of the Valley Worsted Mills, to which corporation they were delivered upon the express condition and agreement with it and with the plaintiff, as the defendant was informed and believed, that all said notes should be taken up and paid at maturity by the payee, "but that the defendant should in no wise be liable upon the same or any of them." That said notes were discounted by the plaintiff, under and by virtue of said agreement and with its agreement that the defendant should not be liable thereon, and that his name was used for the accommodation of the plaintiff, and because under its rules, all paper discounted by it must contain at least two names. That before the commencement of this suit, the payee paid to the plaintiff, in full settlement of all its claims upon said notes, a sum equal to forty per cent. upon the amount thereof. 3 4

The answer concluded with a demand of judgment that the complaint may be dismissed, with costs, and that said notes be delivered to the defendant to be canceled. 5

The only defence which was attempted to be proved was that the plaintiff, which had discounted the notes in suit for the benefit of the payee and indorser, in ignorance that the notes were accommodation paper, was, after the insolvency of both maker and indorser, and about the time of the maturity of the notes, informed, for the first time, that the defendant claimed to be an accommodation maker and that the payee had promised to hold him harmless; that the plaintiff subsequently released the indorser upon the payment of forty per cent. of the amount due upon said notes; that they were accommodation notes and therefore the defendant was discharged. 6

The offered testimony was, upon the plaintiff's objection, excluded, and there being no other defence, a verdict was directed for the plaintiff.

The defendant says that the defence which appeared in the answer was an equitable defence which could not be received in an action in the courts of the United States; that, according to the rules of this court, a replader should have been required by

President, etc. of Union Bank v. Crine, 21 Abb. N. C., 146.

- 7 the plaintiff,* and that none having been asked for, there was a mistrial.

The defence which was alleged in the answer was purely a legal defence, viz.: that before and at the time the notes were discounted, it was agreed by the plaintiff that the defendant should not be liable to it, but that it would rely entirely upon the payee. This defence is not inconsistent with the notes, does not seek to vary their terms or the contract which they contained, but sets up a valid agreement by the plaintiff which freed the maker from his liability. This discharge of the maker, if proved, would have been a fact entirely independent of the contract which is shown by the notes, and would have been, without question, a legal defence (*Manley v. Boycot*, 2 El. & Bl., 46).

The fact that the plaintiff asked; at the end of the answer, for a surrender of the notes, does not turn a purely legal defence into an equitable one.†

The defendant next says that the facts which were attempted to be proved constituted a complete defence in courts of law.

- 9 Although the defence upon the alleged facts is borrowed from a court of equity and is, in that sense, an equitable one, I do not regard it as a defence which can be administered only by a court of equity upon the ground that the relief which is sought must be granted by an injunction or by some other remedy which a court of equity only can furnish, or that the defence contains matter which can be considered only at equity. If the sole defendant is not liable to pay the notes, there is no difficulty in an examination by a court of law, and it is not necessary to

- 10 * See *La Mothe v. Nat. Tube Works Co.*, 15 Blatchf., 432; *Hurt v. Hollingsworth*, 100 U. S., 100.

† Compare *Equitable Ins. Co. v. Cuyler*, 75 N. Y., 511; affirming 12 Hun, 247 (holding that the prayer for relief cannot alone determine whether the pleader is confined to a legal cause of action or defence, or an equitable one, provided the cause is at issue); *Williams v. Slote*, 70 N. Y., 601 (equitable relief demanded where only legal cause of action was alleged); *Hale v. Omaha Natl. Bk.*, 49 N. Y., 626 (legal relief demanded where grounds of equitable relief were stated); *O'Brien v. Fitzgerald*, 143 N. Y., 377 (legal relief demanded where facts alleged might be appropriate either to a legal or equitable cause of action).

President, etc. of Union Bank *v.* Crine, 21 Abb. N. C., 146.

resort to the form or mode of relief peculiar to a court of equity. There is quite a large class of cases pertaining to the discharge of sureties, upon the principles of which cases this defence rests, in which courts of law take cognizance of defences which had their origin in the courts of equity, but which are administered by courts of law, without disregarding the inherent distinctions between the two courts. "In general," said Chief Justice SHAW, in *Carpenter v. King* (9 Met. Mass., 511), "that which would afford a surety a remedy in equity against his creditor by injunction, is a good defence at law, when suit is against the surety alone." Many of the earlier distinctions in regard to the rights of sureties to defend at law, do not now seem to be regarded. The cases upon this point are collected in 2 Amer. Lead. Cases, 448. 12

If the defence is purely equitable, and the remedy, if any, must be administered by a court of equity, the defendant should have proceeded according to the rules regulating proceedings in equity in the courts of the United States (*Burnes v. Scott*, 117 U. S., 582).

Upon the theory that it is a defence which can be examined in a court of law, and confining myself exclusively to the question as it relates to the rights of an indorsee and holder of a negotiable instrument, who took the note or bill for value, in ignorance that it was accommodation paper, I am still of the opinion that the defence is inconsistent with the principles which have generally been considered as settled in regard to the rights of bona fide holders of negotiable paper, and, if the accommodation maker permits the note to go into the hands of bona fide holders for value, without knowledge of the relations between the maker and payee, that he has abandoned all right to enforce his equity as against the ignorant holder. "He who makes a note or accepts a bill for the accommodation of another, virtually authorizes those who take the instrument subsequently to make such terms or arrangements with the drawer or indorsers as may be most conducive to their mutual interests, and cannot revoke the authority thus given to the injury of those who have acted upon it" (4 Daniel on Negotiable Instruments, §§ 1336-1338; *Farmers' Bank v. Rathbone*, 26 Vt., 19). 14

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- 15 I do not think it advisable to make an extended argument upon this question, which is an important one, and upon which there is a conflict of opinion, because the case will probably go to the Supreme Court, where the question will be authoritatively settled. Meantime the numerous conflicting authorities will be found collected in 2 Daniel on Neg. Instr., 316-321; 1 Pars. on Bills and Notes, 233, and *In re Goodwin*, 5 Dill., 140.

It may be added that the only decision of the Court of Appeals of New York which is directly upon the point in ques-
 16 tion in regard to negotiable paper is against the validity of the defence (*Hoge v. Lansing*, 35 N. Y., 136).

The motion is denied and the stay of execution is vacated.

MACK v. KITSELL.

New York City Court, Special Term, 1887.

[Reported in 20 Abb. N. C., 293.]

1. The claim of a surety to compel his principal to discharge the liability, although the surety has not yet actually paid anything, is available under the new procedure as an equitable defence to an action by the principal or one standing in his shoes on an independent cause of action, on which the surety is indebted to the principal.
 2. An assignee for the benefit of creditors sued for the price of goods sold.—*Held*, that defendant might plead as an equitable defence, that he had made accommodation paper for the benefit of the assignor, in reliance on the assignor's promise to hold him harmless; and that the assignor, being insolvent and the paper unpaid, judgment had been recovered against defendant therein; for in such case defendant is equitably entitled to have the debt claimed by the assignee applied in satisfaction of the defendant's liability as surety.
 3. Since the provisions of Chap. 6 of the Code of Civil Procedure—which relate to pleading in courts of record, including counterclaims—apply to the N. Y. City Court (N. Y. Code Civ. Pro., § 8347, subd. 4) as well as to County Courts, Superior City Courts and the Supreme Court—equitable defences may be pleaded in the City Court in the same cases as in the Supreme Court.
- 1 Demurrer to answer.

Hugo S. Mack, as assignee for the benefit of creditors, sued Wm. F. Kitsell for the price of goods sold and delivered by the

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assignors. The part of the answer setting up a separate and affirmative defence was as follows: 2

First.—The defendant, on information and belief, avers that the plaintiff's assignors are entirely insolvent; that their schedule of liabilities and assets, filled in pursuance of law in the office of the clerk of the Court of Common Pleas in and for the City and County of New York subsequent to the making of the assignment, set forth in paragraph II. of the complaint, shows \$153,307.70 of liabilities and \$23,843.22 of assets.

Second.—That heretofore and before said assignment was made, and on or about January 17, 1887, the plaintiff's assignors represented to the defendant that they were solvent and that their assets were greatly in excess of their liabilities, and then and there urged the defendant to make his certain promissory note for their accommodation. 3

Third.—That the defendant thus urged, and relying upon said representations and upon their express promise to meet said note and to indemnify and save harmless the defendant from all costs and damage in consequence of his becoming such accommodation maker, then and there made certain notes payable to said assignors and delivered the notes to them without any consideration; that the notes were of the following denomination and five in number, viz.: \$423.80, \$423.80, \$423.80, \$491.40 \$521.60, making a total of \$2,284.40, which notes the plaintiff's assignors had discounted for their own sole and exclusive benefit. 4

Fourth.—The defendant was not aware of the plaintiff's assignors' true financial condition at the time of the delivery of the notes on or about January 17, 1887, or that they were about to fail and make an assignment within ten days afterwards, and the defendant believed their statement that they were solvent and that the defendant would not have made the notes but for such statement; on information and belief the defendant avers that the plaintiff's assignors were then hopelessly insolvent, and they well knew it at the time, and that they made the false assertion of their solvency to deceive and defraud the defendant and entrap him into making said accommodation paper. 5

Fifth.—That said notes which the defendant made for the accommodation of plaintiff's said assignors have matured and

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6 the plaintiff and his assignors have failed, neglected and refused to pay said notes or either of them as the plaintiff's assignors had agreed to do, and the defendant has been sued by the North River Bank upon one of the notes which it had discounted for the plaintiff's assignors, amounting to the sum of \$491.40, and judgment went against the defendant on May 4, 1887, for \$511.80, and there is now outstanding an execution against the defendant's property issued upon said judgment.

7 *Sixth.*—The defendant has suffered damages by the failure of the plaintiff and his assignors to meet said obligation as the plaintiff's assignors had agreed to do, and by their failure to indemnify and save harmless the defendant from all costs and damage in consequence of making said notes for their accommodation.

Seventh.—That the remainder of said notes will soon mature, greatly to the defendant's detriment; that by reason of said judgment and execution, and the defendant's liability under the other notes, the defendant has suffered and will suffer damages in a sum greater than any sum which the defendant may owe for
8 goods sold to him by the plaintiff's assignors.

Wherefore the defendant prays for a judgment:

First.—That the plaintiff's complaint be dismissed.

Second.—That the damages suffered by the defendant may be set off against any alleged claim for goods sold to the defendant.

Third.—That as a condition precedent to the recovery by the plaintiff in this action that he carry out his assignors' agreement to save the defendant harmless against said judgment, execution and notes by discharging them all.

9 *Fourth.*—That the defendant have his costs and disbursements of this action.

To this answer the plaintiff demurred for insufficiency.

McADAM, Ch. J. This case may be viewed in two aspects—one legal, the other equitable. At law, if A makes promissory notes for the accommodation of B, the payee, and they are subsequently negotiated and dishonored, A has no cause of action against B until he first pays the notes, and then his action is for money paid to B's use (Cow. Tr., § 317, and cases cited). Tested

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by these common law rules, the outstanding liability pleaded by 10
the defendant constitutes no defence to the demand in suit. But
A (the defendant) pleads, as he lawfully may, to a common law
action, an equitable defence (Code Civ. Pro., § 507), to wit: (1)
the insolvency of B. (2) That as the notes given to B were for
B's accommodation, B in point of fact is principal, and A merely
surety thereon, and that B agreed to indemnify and save A harm-
less therefrom. It is true A has no claim till he has paid some-
thing on the liability, but in equity he may, as surety, apply to
the court for such relief as will compel B to discharge the
liability (S Wend., 194; 6 Paige, 258; 3 Swanst., 368). 11

A would be entitled to this relief if he had commenced a suit
in equity for that purpose; and the Code of Civil Procedure
(§ 507), in effect provides that he may obtain such relief by
means of an equitable defence. The judgment for the plaintiff
may provide that the defendant be allowed to pay the amount
of any recovery in discharge of his liability. (Hannay v. Pell, 3
E. D. Smith, 432.) The present action resembles very much the
case last cited, and the relief claimed may be granted (B being
insolvent), though the liability of A has not as yet matured. 12
(Lindsay v. Jackson, 2 Paige, 581.) In the present instance part
of the liability has matured and is in judgment, as in Hannay v.
Pell (*supra*). The plaintiff is an assignee of B for the benefit of
creditors, and this equitable defence is equally available against
him. (Smith v. Felton, 45 N. Y., 419; Rothschild v. Mack, 3
N. Y. State Rep., 471.)

The Code provision in regard to equitable defences applies to
the City Court as fully as to the Supreme Court of the State
(Code Civ. Pro., § 3347, subd. 4). It follows that the defendant
has pleaded a good equitable defence, and that the demurrer 13
thereto must be overruled, with costs.

Carpenter v. Manhattan Life Ins. Co., 93 N. Y., 552.

CARPENTER v. MANHATTAN LIFE INS. CO.

New York Court of Appeals, 1883.

[Reported in 93 N. Y., 552.]

1. A counterclaim under Code Civ. Pro., § 501, subd. 1, must have such a relation to, and connection with, the subject of the action, that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counterclaim should be settled in one action by one litigation; and that the claim of the one should be offset against, or applied upon, the claim of the other.
 2. In an action for converting timber, defendant pleaded as a counterclaim that the land from which the timber was cut was mortgaged to defendant, and that plaintiff wrongfully cut the timber thereon for the purpose and with the effect of impairing defendant's security.—*Held*, a proper ground of counterclaim, because connected with the subject of the action.
- 1 Action for the conversion of a quantity of cord wood. The facts fully appear in the opinion.

At Circuit the court held that the counterclaim was improper, as not arising out of the transaction set forth in the complaint, and was not connected with the subject of the action, and refused to allow defendant to give proof to establish it.

- 2 *The General Term of the Supreme Court* reversed the judgment.

The Court of Appeals affirmed the judgment of the General Term.

- 3 EARL, J. The action was brought to recover against the defendant for the wrongful conversion, on the 23d day of January, 1879, of a quantity of cord wood. The answer admitted the possession of the wood by the plaintiff, and that the defendant took the same, but denied that the plaintiff owned the wood; and then for a counterclaim, it was alleged that on the 28th day of September, 1871, one Markham, then the owner in fee of the land mentioned in the complaint, executed to the defendant a bond, and a mortgage as collateral thereto on the land, to secure the payment to the defendant of the sum of \$45,000, with interest; that thereafter, on default of payment of the sum thus

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secured, the defendant foreclosed the mortgage and became the purchaser at the foreclosure sale, for a sum which left a deficiency of over \$17,000, for which judgment was entered against Markham, who was then, and for three years had been, to the knowledge of the plaintiff, wholly insolvent; that the land was, to the knowledge of the plaintiff, insufficient security for the amount of the bond and mortgage, and he being a second mortgagee with such knowledge, and in possession of the land, between November 7, 1877, and January 23, 1879, wrongfully, fraudulently and with intent to cheat and defraud the defendant, and with the intent to reduce its security and deprive it of such security, cut or caused to be cut from the land the wood mentioned in the complaint, thereby wasting the land, and lessening and reducing defendant's security to its damage \$500. 4 5

Upon the trial, after the plaintiff had proved his title to the wood, its quantity and value, and the conversion thereof by the defendant, and had rested his case, the defendant then offered to prove the facts alleged in the answer by way of counterclaim, and the plaintiff objected to such proof and the court sustained the objection. From the judgment entered in favor of the plaintiff, the defendant appealed to the General Term, and there the judgment was reversed, and then the plaintiff appealed to this court. 6

It is admitted by the plaintiff, as claimed on the part of the defendant, that the facts alleged in the answer show a cause of action against the plaintiff. But the plaintiff's claim is, and so it was held at the trial term, that the cause of action did not arise out of the transaction set forth in the complaint, and was not connected with the subject of the action, and hence was not a proper counterclaim under section 501 of the Code. 7

The transaction set forth in the complaint was the conversion of the wood, and hence it cannot be said that the counterclaim arose out of that transaction. But, was it not connected with the subject of the action? The word "connected" may have a broad signification. The connection may be slight or intimate, remote or near, and where the line shall be drawn it may be difficult sometimes to determine.

The counterclaim must have such a relation to, and connection

Lipman v. Jackson Architectural Iron Works, 128 N. Y., 58.

- 8 with, the subject of the action, that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counterclaim should be settled in one action by one litigation; and that the claim of the one should be offset against, or applied upon, the claim of the other. Here it is sufficiently accurate to say that the subject of the action was the wood wrongfully taken by the defendant, and the counterclaim was for damages sustained by the defendant, in the wrongful impairment of its security, by the severance of the
- 9 same wood from the land, and thus diminishing the value of the land by the value of the wood. In such case it is certainly just that the defendant should counterclaim its damage for the severance of the wood against the plaintiff's claim for the conversion thereof. In the forum of conscience, the plaintiff was under obligation to restore the wood to the defendant as a portion of its security for its claim against the mortgagor. Thus it can with great propriety be said that defendant's claim had some connection with the subject of the action.
- 10 The order of General Term should be affirmed, and judgment absolute ordered against the plaintiff, with costs.
- All concur.
- Order affirmed and judgment accordingly.

LIPMAN v. JACKSON ARCHITECTURAL IRON WORKS.

New York Court of Appeals, 1891.

[Reported in 128 N. Y. 58.]

1. A counterclaim must tend in some way to diminish or defeat the plaintiff's recovery.
2. In an action to foreclose a mortgage,—*Held*, that a defendant against whom no personal judgment is demanded, cannot set up, by way of counterclaim, a claim, which, if established, can only result in an independent judgment for money, having no effect whatever upon the foreclosure.
3. A plaintiff does not waive his right to object to a counterclaim as not permissible, by failing to demur or take the specific objection to it by answer.

Lipman v. Jackson Architectural Iron Works, 128 N. Y., 58.

4. Code Civ. Pro., §§ 498, 499, providing that if certain objections are not taken by demurrer or answer they are deemed waived, relates only to defects in the complaint and a waiver by the defendant.

Plaintiffs sued to foreclose a mortgage given to secure future advances. These advances were to be in specific installments, dependent upon different stage of work done in the construction of the building on the mortgaged premises. 1

The sole defendant, who appealed, the Jackson Architectural Works, before some of the final installments had been earned, filed a mechanic's lien for work done and material supplied upon the building. Plaintiffs declined to continue the payment of the installments until some arrangement was made regarding this lien. Thereupon the three parties interested, the owner of the building, the plaintiff mortgagees, and the lienors, executed a contract, wherein the lienors agreed to subordinate their lien to the further advances to be made under the mortgage, and the mortgagees agreed to pay the amount of the lien out of such further advances when they should be earned by reason of the progress of the building. The last agreement was in the form of an order by the owners upon the mortgagees, directing them to pay to the lienors specified sums "out of the moneys growing due to us . . . payable according to the terms of said contract;" the order was accepted by the mortgagees "payable as above." 3

The building was never carried to the stage of completion which made these final installments due; the mortgagees, however, advanced to the owners the full amount thereof, and did not pay to the defendant lienors the amount of their lien.

The defendant lienors set up the above facts as a counterclaim, upon which they demanded an affirmative judgment against the plaintiffs for the amount agreed to be paid under the acceptance. 4

The Referee gave judgment for plaintiffs for foreclosure and sale, and dismissed the counterclaim on the ground that, as against the mortgagees the amount was not yet payable, as the express condition upon which the payment was promised (the progress of the building to a certain stage of completion) had not been fulfilled.

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- 5 *The General Term of the Court of Common Pleas* affirmed the judgment.

The Court of Appeals affirmed the judgment.

- FINCH, J. [*on the admissibility of the counterclaim, said*]: It is true that the counterclaim pleaded was dismissed, but that result was necessary because, whatever its merits, it was not a permissible counterclaim in the action for foreclosure. It set up a legal cause of action on the acceptance and against the acceptors as such, and asked a money judgment against them. Assuming,
- 6 which we do not decide, that the plaintiffs were thus liable on their acceptance, the debt was not the subject of a counterclaim in the equity action. The plaintiffs demanded no personal judgment against the appellant, and so the claim of the latter could in no manner lessen or limit or cut down the relief which the plaintiffs sought and to which they were clearly entitled. The Code of Civil Procedure requires that the counterclaim must tend in some way to diminish or defeat the plaintiffs' recovery (§ 501), and enacts in this respect the doctrine of *National Fire*
- 7 *Ins. Co. v. McKay* (21 N. Y., 191). The defendant's plea has and can have no such effect. Its alleged lien as a lien was subordinate to that of the plaintiffs, and its debt as a debt could not diminish or defeat the plaintiffs' relief upon their cause of action. The lien was no defence and the debt no counterclaim. Proof of the latter could only result in an independent judgment for money, having no effect whatever upon the foreclosure. The application of the doctrine is well illustrated in *Hunt v. Chapman* (51 N. Y., 555). In that case the counterclaim was allowed, but
- 8 because the plaintiff asked a judgment upon the bond for a deficiency against the defendant asserting the counterclaim, and the claim of the latter became simply contract against contract, and if allowed would defeat or diminish the plaintiff's recovery. Here, no personal judgment is sought against the appellant and there is nothing upon which its claim can be applied, or which it can possibly effect.

It is said, that plaintiffs, not having demurred to the counterclaim or specifically objected to it by answer, have waived the objection. The section of the Code providing for such waiver

Otis v. Shants, 128 N. Y., 45.

relates only to defects in the complaint and a waiver by the defendant. (§§ 498, 499.) The appellants requested a finding of law awarding judgment on the counterclaim, which the referee refused. The respondents may defend that refusal upon the ground asserted, as well as that upon which the referee seems to have acted. 9

For these reasons the judgment should be affirmed, with costs.

All the judges concurred.

Judgment affirmed.

OTIS v. SHANTS.

New York Court of Appeals, 1891.

[Reported in 128 N. Y., 45.]

1. Trustees of a corporation under a liquidation agreement sued upon promissory notes given by defendant for property purchased of plaintiffs as such trustees.—*Held*, that an answer presented no defence, which alleged that the defendant became a party to the liquidation agreement by fraudulent representations made by the corporation, and asked for judgment cancelling the agreement as to him.
2. Fraud in procuring the execution of such an agreement by defendant constitutes no ground for exempting him from the performance of an independent contract entered into between him and the trustees subsequent to the execution of such liquidation agreement and founded upon a new consideration.
3. In such an action, claims cannot be offset or counterclaimed which are founded upon transactions with the corporation prior to the appointment of plaintiffs as trustees, for that would be allowing defendant an inequitable preference.
4. Where defendant does not ask affirmative judgment on his so called counterclaim, but only seeks to use it to extinguish plaintiffs' cause of action, Code Civ. Pro. § 495,—which provides that plaintiff may demur to a counterclaim when certain objections enumerated therein appear on its face, and § 496, requiring the objections taken under § 495 to be distinctly specified,—do not apply.

Action by trustees under an agreement for the liquidation of a corporation, upon promissory notes given by defendant for property purchased by him of the trustees subsequent to their assumption of the trust. The facts essential to the decision are given in the opinion. 1

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- 2 *The Special Term of the Supreme Court* overruled plaintiffs' demurrer to the counterclaims.

The General Term reversed the judgment and sustained the demurrer.

The Court of Appeals affirmed the judgment.

- ANDREWS, J. The plaintiffs do not sue to enforce any obligation under the "agreement in liquidation." The action is upon notes given for property purchased by the defendant of the trustees after they had assumed the trust. The first count
3 in the answer alleges that the defendant was induced to become a party to the liquidation agreement by fraudulent representations made by the Mill River Button Company, its agents, officers and directors, and asks for judgment setting aside and cancelling as to him the agreement. This answer was not a defence. The agreement was between the corporation, the creditors and the trustees. The proper parties are not represented in this litigation, to entitle the defendant to judgment upon this issue. Neither the corporation nor the other creditors are before
4 the court, and both have an interest and are entitled to be heard on the adjudication of this question. Moreover, fraud in procuring the execution of the agreement by the defendant, would constitute no ground for exempting him from the performance of an independent contract entered into between him and the trustees subsequent to the execution of the agreement in liquidation and founded upon a new consideration. The first answer was clearly insufficient, because admitting its averments the defendant would be entitled to no relief.

- 5 The second, third, fourth and fifth answers are founded upon alleged counterclaims. They all set up transactions between the Mill River Button Company, its officers and agents and the defendant, which took place prior to the execution of the liquidation agreement. The second answer seeks to counterclaim damages alleged to have been sustained by the defendant, arising from the fraud and deceit of the corporation connected with an advance of money made by the defendant to the corporation. The third answer counterclaims damages alleged to have been sustained by the defendant by the fraudulent refusal of the cor-

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poration to perform its contract to deliver a portion of its capital stock to the defendant in consideration of money advanced by the defendant. The fourth answer alleges an indebtedness of the corporation to the defendant in the sum of \$2,800 for money loaned. The fifth answer alleges a violation by the company of a contract of employment whereby the defendant sustained damages in the sum of \$3,000. The defendant in his answer does not ask any affirmative judgment on his counterclaims, but as to each he asks simply that he be permitted to set off sufficient thereof to satisfy the claims of the plaintiff. 6

It is very clear that neither of the answers alleging counterclaims set up any claim that can be set off against the causes of action in the complaint. The alleged counterclaims are not against the plaintiffs. They are founded upon transactions with the corporation, prior to the appointment of the plaintiffs as trustees. The plaintiffs' claims have no connection therewith, and arose subsequent to the execution of the liquidation agreement, upon contracts not tainted with the alleged fraud in concoction of the agreement. The fact that the defendant was induced to execute the agreement by fraud is no answer to his obligation arising on a purchase from the trustees, nor does it enable him to set off against the debt a claim against the corporation. This would be giving him an inequitable preference. 7 8

The plaintiffs demurred to the several answers setting up counterclaims, on the ground "that they were insufficient in law upon the face thereof." Section 494 of the Code of Civil Procedure makes this a ground of demurrer to a counterclaim. But it is claimed that where the defect in an answer alleging a counterclaim is, that the cause of action sought to be counterclaimed did not arise out of the contract or transaction set forth in the complaint, or was not connected with the subject of the action, or that it does not state facts sufficient to constitute a cause of action, these objections must be specifically taken under section 495, and that they are not raised by a demurrer for insufficiency. That the answers were insufficient as answers of counterclaim, we cannot doubt. They set up no cause of action against the plaintiffs. The claims alleged, if they existed, were wholly irrelevant to the claims sued upon. Assuming that 9

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10 they were statements of good causes of action, they did not exist against the plaintiffs. It is, however, a decisive answer to the defendant's contention that the demurrer should have been drawn under section 495, that that section only applies where the defendant demands affirmative judgment on his counterclaim and has no application where the defendant seeks to use his counterclaim for the purpose simply of extinguishing the claim of the plaintiffs.

We think the judgment of the General Term was right and
11 should, therefore, be affirmed.

All the judges concurred.

Judgment affirmed.

RICE v. GRANGE.

New York Court of Appeals, 1892.

[Reported in 181 N. Y., 149.]

1. A defendant is not entitled to avail himself of an affirmative defence to the action by way of counterclaim, unless he has pleaded it in explicit terms, and not left it to inference.
 2. In an action by the assignee for the benefit of creditors of the payee against the maker of a promissory note, defendant alleged as "a defence to the cause of action alleged in the complaint" a failure of consideration as to the note in suit because of default in payment of the note of a third person in exchange for which defendant's note had been given, and offered in the answer to re-exchange the notes,—*Held*, that the answer could not be considered as interposing an equitable counterclaim.
 3. Upon an exchange of notes, each party becomes the holder for a good consideration of the note delivered to him, and failure of consideration is not established in an action upon one note, by proof that the other has become due and remains unpaid.
- 1 *At Circuit*, plaintiff had judgment on a verdict directed by the court.

The General Term of the Supreme Court affirmed the judgment. In delivering the opinion of the court, VAN BRUNT, P. J., said: "We have examined the answer in vain to find any suggestion of a counterclaim or offset. It is clear that no counter-

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claim could be set up, because no cause of action could be maintained against the assignee; and, even if an offset might be allowed, there are no allegations in the answer making any such claim whatever." 2

The Court of Appeals affirmed the judgment.

GRAY, J. This action was upon the promissory note of the defendant, made to the order of Earl B. Chace & Co.; and the plaintiff is the assignee of the payees, under an assignment for the benefit of their creditors, executed at a time subsequent to the maturity of the note. The defence set up in the answer was a failure of consideration. The facts as developed upon the trial of the action were precisely these: That in December, 1889, Chace placed in the hands of a broker a promissory note made by Hawkins & Co. to the order of Chace's firm, and not yet due. This broker called upon the defendant, and offered to give Chace's note in exchange for one of defendant's, and this proposition was accepted. Subsequently the broker took the Hawkins note, with Chace & Co.'s indorsement upon it, to the defendant, and received from him the note in suit, which was for the same amount as the Hawkins note. When the Hawkins note fell due, it was not paid, and was protested. Upon the maturity thereafter of the defendant's note, payment thereof was refused by him. Some three months later, Chace & Co. made their general assignment to plaintiff. The defendant, in support of his appeal from the judgment recovered against him, insists that the defence of failure of consideration was established, and that it was, therefore, error for the trial judge to direct a verdict for the plaintiff. His counsel argues that the defendant's agreement to pay Chace was executory, merely, and was dependent upon the payment of the Hawkins note. In other words, he considers that there was to be implied in this transaction a promise by Chace that the Hawkins note would be paid at maturity, and that this promise formed the consideration for his promise to pay the same sum to Chace in his note. But the defendant has misapprehended the legal effect of the transaction. Upon the exchange of these notes the particular transaction between the parties was fully consummated, and was in no sense executory. Each party 3 4 5

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- 6 became the holder for a good consideration of the note delivered. The consideration for the defendant's note was the transfer and delivery to him of the Hawkins note, and was as good and absolute as it would be in any case of an exchange of property. This was a business transaction; and whether the consideration was in an exchange of notes or was paid in money is quite the same thing. In an exchange of notes, each note is a valid consideration for the other, and is fully available in the hands of its holder. (Cobb v. Titus, 10 N. Y., 198.) The undertaking by
- 7 Chace & Co., upon their indorsement and transfer of the Hawkins note, was a legal consideration for the defendant's promise; and no agreement is to be implied which is not expressed upon the papers.

- Nor is the defendant entitled, in this action, to offset a claim upon the Hawkins note. If the defendant had set up an equitable counterclaim to the plaintiff's cause of action, he might then have been in a position to show that no equities or rights of others had intervened, and that the transaction between him and Chace was such as to justify offsetting one note against the other.
- 8 But such a defence is wholly unavailable to him, for the want of any allegations in his answer making such a counterclaim. His sole defence was a failure of consideration, and there was nothing in the answer which amounted to a plea of an equitable set-off. Under our practice a party having an affirmative defence to the action, by way of a counterclaim, is bound to plead it in explicit terms, and not leave it to inference. Here the defendant pleads a "defence to the cause of action alleged in the complaint," and, after setting it out, avers that it establishes an entire failure of consideration, and makes offer to re-exchange the notes. This
- 9 did not amount to a counterclaim; and he seems to have recognized the fact, when, at the close of the trial, he moved "to amend the answer by setting up a counterclaim." The denial of the motion was not excepted to, and an exception would have been unavailing here, as it was discretionary with the court to grant or deny such a motion. The judgment appealed from should be affirmed, with costs.

All concur, except MAYNARD, J., taking no part.

Judgment affirmed.

Hubbell v. Fowler, 1 Abb. Pr. (N. S.), 1.

HUBBELL v. FOWLER.

New York Supreme Court, Special Term, 1865.

[Reported in 1 Abb. Pr. (N. S.), 1.]

1. An answer interposing the Statute of Limitations, presents a proper case for the court to require, on defendant's motion, that the plaintiff reply.*
2. It is not generally essential that the defendant, in moving to compel such reply, should state that he does not know the ground on which the plaintiff intends to rely to defeat the bar of the statute.

The action was upon a promissory note to which the defendant pleaded, first, the Statute of Limitations; secondly, payment. Defendant moved that plaintiff be required to reply to the first defence contained in the answer. The affidavit in support of the motion showed that the summons was in fact served more than six years after the maturity of the note sued upon, and that the defendant was advised by counsel that it was necessary for the proper defence of the suit, that the defendant's counsel should be informed before the trial in what way the plaintiff expected to defeat the operation of the statute. There were also the usual affidavits of merits.

MULLEN, J. In this case the defendant has pleaded the Statute of Limitations, and now asks for an order requiring the plaintiff to reply to the plea, by specifying the grounds which he relies upon to defeat the operation of the statute.

This case is not one in which, by the Code of Procedure, the plaintiff is bound to reply, or the facts stated in the answer will be taken as admitted. But the application is made under Section 153 of the Code [Code Civ. Pro., § 516], which provides that in cases other than where a counterclaim is set up in the answer, if the answer contains new matter constituting a defence by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter.

The case before me is one in which the court has power to require a reply.

To introduce the practice of requiring a reply in all cases

* Compare next case.

Hubbell v. Fowler, 1 Abb. Pr. (N. S.), 1.

4 which may come within the terms of the clause of the section cited, is to multiply motions not only unnecessarily but unreasonably. In many, if not in most cases, the defendant knows with reasonable certainty the answer which will be given to his defence; and there can be no reason for a motion to enable him to ascertain a fact of which he is already cognizant.

There are, however, very many cases in which the defendant may not know the answer which the plaintiff may make to the new matter in his defence, because it may be matter affecting the plaintiff personally, or the business may have been transacted on
5 the part of the defendant by an agent, or there may be, as in the case before me, a large number of answers which may be insisted on by way of reply to the new matter of the answer, all of which it would be unreasonable to require the defendant to prepare to meet on the trial, although the matter to be replied to may be presumed to be known to him personally.

The bar by reason of the running of the Statute of Limitations may be defeated in several different ways.

1. By the commencement of an action within the time
6 limited.

2. By an attempt to commence such action as prescribed in § 99 of the Code. [*Code Civ. Pro.*, § 399.]

3. By absence of the defendant from the State when the right of action accrued. [*Id.*, § 401.]

4. If the plaintiff was under twenty-one years, or [*id.*, § 396],

5. Insane, or

6. Imprisoned on a criminal charge, or

7. A married woman.*

8. Death of the person having the right of action before the
7 time limited expired. [*Id.*, § 402.]

9. That the plaintiff was an alien, subject or citizen of a country at war with the United States.

10. Actions brought to judgment recovered, and reversed on appeal. [*Id.*, § 405.]

11. Stay by injunction. [*Id.*, § 406.]

12. A new promise. [*Id.*, § 395.]

To this last may be added others, unnecessary to enumerate;

* Coverture is no longer a bar.

N. Y., *Lake Erie & Western R. R. Co. v. Robinson*, 25 Abb. N. C., 116.

but the list is sufficiently formidable to show how difficult it may be in many cases to know on what ground the plaintiff intends to defeat the bar of the statute. 8

If there is any case in which it is proper to require a reply, it seems to me this is the one.

It was suggested by counsel that the defendant should be required to aver that he does not know the ground on which the plaintiff intends to rely to defeat the bar. While this may in some cases be very proper, yet in most instances the nature of the defence, and the manner in which the business was conducted out of which the action or defence accrued, will afford a much better guide in determining the propriety of requiring a reply. In this case I do not deem it essential. 9

Let an order be entered requiring the plaintiff to serve a reply to the answer setting up the Statute of Limitations within twenty days from service of copy order; the costs of the order, \$10, to abide event of the suit.

NEW YORK, LAKE ERIE & WESTERN R. R. CO.
v. ROBINSON.

N. Y. Supreme Court, First Department, General Term, 1887.

[Reported in 25 Abb. N. C., 116.]

A plaintiff will not be compelled to serve a reply to new matter in an answer which sets up the Statute of Limitations* and an adjudication in another State, which is claimed to constitute *res judicata*.

This action was brought by the New York, Lake Erie & Western Railroad Company against Charles Robinson to have certain shares of stock of the National Stock Yard Company, which had been delivered by defendant to the Erie Railway Company or its receiver, declared to be unlawfully issued, in the hands of defendant; to have a certain contract cancelled and surrendered up, and defendant enjoined from claiming any benefit under it; that defendant be adjudged to have obtained certain 1

* Compare preceding case.

N. Y., *Lake Erie & Western R. R. Co. v. Robinson*, 25 Abb. N. C., 116.

- 2 property and assets under said agreement by fraud, and that the same be adjudged to belong to the Erie Railway Company, or to plaintiff as its successor; and for damages, etc.

The answer among other things alleged as follows:

For a third and separate defence (to the first alleged cause of action):

- “XXII. An equity suit was heretofore brought by Hugh J. Jewett (the person mentioned in the complaint herein as receiver of the Erie Railway Company), as such receiver, against this defendant in the Cook County Circuit Court, in the State of
- 3 Illinois, in chancery, the bill of complaint wherein prayed for a decree by which it might be adjudged and decreed among other things, that this defendant gave no consideration for the 3,623 shares of stock mentioned in the contract, ‘Exhibit A,’ to the complaint herein, and had no legal or equitable right or title in or to the same; that the actual title to the one thousand shares of stock of John B. Sherman (mentioned in the complaint herein) in the National Stock Yard Company, remained in said Erie Railway Company; that this defendant acquired no title to
- 4 the one thousand shares of stock allotted to him (mentioned in the complaint herein), and that the actual title remained in the Erie Railway Company; that the agreement, a copy whereof is annexed to the complaint herein, was induced by false and fraudulent representations of said defendant, and that the same should be cancelled and annulled; that defendant should be required to pay to said Jewett, as such receiver, the sum of \$53,000, with the interest thereon, and for such further and other order of relief as the nature of the case might require, and as might be agreeable to equity and good conscience.
- 5 “XXIII. Said bill of complaint was personally subscribed by said Jewett and verified by him upon oath on April 11, 1878, and contains all the allegations material to the present action which are contained in the amended complaint herein, except that (if it be a material allegation) said receiver and said Erie Railway Company were induced to make said contract (‘Exhibit A’ to the complaint herein) by reason of the statements of this defendant that his title to said stock was a good and clear title, and that no other person had a lawful claim

N. Y., *Lake Erie & Western R. R. Co. v. Robinson*, 25 Abb. N. C., 116.

thereto, and this matter might have been also litigated in the said Illinois suit. The paper hereto annexed as a part hereof and marked 'Exhibit A,' is a true copy of the bill of complaint in said Illinois suit. 6

"XXIV. This plaintiff, on or about February 10, 1887, became a party complainant to the suit mentioned in said paragraph, and filed a supplemental bill of complaint therein by leave of the said court. Answers were filed to the said bill and supplemental bill therein by this defendant, denying the equities set up in said bills; replication was filed by complainant, and said suit duly came on to be heard by said court in chancery, and each party introduced evidence upon said hearing, and the taking of evidence therein was closed, and thereafter and on or about February, 1887, the said bill and supplemental bill in said suit were dismissed by order of the said court, a copy of which order is hereto annexed as a part hereof and marked 'Exhibit B.' The recitals in said order are true. Said trial was had and said bill and supplemental bill dismissed as aforesaid since this action was commenced. 7

"XXV. By said order the matters herein in litigation were finally adjudicated and settled, and the plaintiff is thereby debarred from prosecuting this action." 8

For a third and separate defence (to the second alleged cause of action):

"XXVI. The allegations of paragraphs XXII. to XXV. hereof, inclusive, are true, and are hereby repeated as a defence to the second alleged cause of action."

For a fourth and separate defence (to the first alleged cause of action):

"XXVII. Each and every fact alleged in the amended complaint (exclusive of paragraphs [*specifying them by number*] thereof) was discovered by Hugh J. Jewett, therein mentioned, on or before April 11, 1878. This action was commenced on or about May 1, 1886. 9

"XXVIII. Plaintiff's alleged cause of action did not accrue within six years before the commencement of this action."

For a fourth and separate defence (to the second alleged cause of action):

N. Y., *Lake Erie & Western R. R. Co. v. Robinson*, 25 Abb. N. C., 116.

- 10 "XXIX. This action was commenced on or about May 1, 1886. Plaintiff's alleged cause of action did not accrue within six years before the commencement of this action."

The defendant moved before LAWRENCE, J., to compel the plaintiff to reply to these allegations; and this appeal was from the order denying such motion.

- PER CURIAM [VAN BRUNT, P. J., BRADY and DANIELS, JJ.].
There seems to be no good reason shown upon the papers presented on this record for requiring a reply to the answer herein,
11 unless the rule is to be adopted that the court will require a reply to any new matter set up by way of defence.

The allegations as to the proceedings of the court in Illinois can be easily proven, if true, by an exemplified copy of the record in that court, and no reply should be required.

- The defence of the Statute of Limitations is one which the defendant must establish for himself, and the plaintiffs cannot be called upon to lend their assistance to him, or to aid him in
12 the performance of that task.

The case of *Watson v. Phyfe*,* which seems to be relied upon as an authority for the granting of the motion in this action, presented features entirely different from those existing in the case at bar.

In that case, upon various grounds essentially different in their nature, the averments of the answer might be attacked, and the court held that the defendant should be informed of these grounds by a reply.

- In the case at bar, the effect of the alleged adjudications in
13 Illinois must depend upon the record of the proceedings in that State and the laws applicable thereto; and of this fact the defendant is perfectly aware, and cannot, therefore, be surprised by the introduction of some new and unexpected reply to his defence.

The order appealed from should be affirmed, with \$10 costs and disbursements.

* 20 Weekly Dig., 372.

 Note on Pleading in Avoidance.

NOTE ON PLEADING IN AVOIDANCE OF A DEFENCE BY REPLY, VOLUNTEERED OR COMPELLED, OR BY AVOIDANCE IN THE COMPLAINT OF AN ANTICIPATED DEFENCE.

[From 25 Abb. N. C., 120.] At common law and under the earlier 1
chancery practice, new matter contained in a plea was brought to issue
only by a replication; and if the plaintiff designed to prove anything in
avoidance of such new matter, the replication was special, stating the
facts in avoidance.

The prolixity in pleading which resulted—naturally greater in chancery
than at common law—led to the disuse of special replications in the
English chancery, plaintiff being allowed to amend his bill so as to set up
the same matter in avoidance which otherwise would have required a
special replication. The United States Supreme Court rules in equity 2
adopted this practice and forbade special replications. The usual pro-
visions in the Codes of Procedure adopt the same principle for all actions,
and, with the exceptions hereafter noticed, abolish replications, not only
general replications as a formality for joining issue, but also special repli-
cations as a disclosure of grounds for avoiding new matter set up as a
defence in the answer; so that under the New Procedure, when a defend-
ant serves an answer setting up new matter in defence and goes to trial,
his allegations are on the one hand traversed by the statute, without any
actual denial; but, on the other hand, plaintiff may prove anything what-
ever in avoidance of such new matter, and defendant has no right to
object on the ground of surprise. Two qualifications of this general rule 3
are made by the Codes, one absolute, and the other discretionary with the
court:

1. If it is shown that defendant is embarrassed in his preparation for
trial by being left in the dark as to what avoidance plaintiff relies on for
meeting defendant's defence, the court will require plaintiff to put in a
reply which will state, and therefore limit, the subjects of proof:

2. If the answer sets up new matter as a *counterclaim*, and includes
therein a demand for affirmative relief against the plaintiff, the allega-
tions of the counterclaim are treated like the allegations of a complaint,
as having been admitted if not denied, and a reply is necessary in order 4
to deny them.

The Code adopted the general principles of equity pleading as the basis
of pleading under the new system and abolished replications, but did not
expressly prescribe any rule as to matter in the complaint in avoidance of
an anticipated defence.

In equity, such matter was first stated in the charging part of the bill;
by later practice it was allowed as proper in the narrative part of the
bill.

Every equity practitioner is familiar with the convenience of thus nar-
rowing the issue which defendant might otherwise raise.

Note on Pleading in Avoidance.

- 5 The Codes, however, by making a complaint sufficient which states facts sufficient to constitute a cause of action, departed from the equity rule that the bill must state by amendment, if not originally, an avoidance of the defence, but substituted the rule that the court may require a reply in its discretion.

The practice of amending so as to bring into the complaint matter of evidence was repeatedly sanctioned under the Code in the earlier cases before it was as well settled as now that plaintiff may prove any facts constituting a common law avoidance of new matter in defence, although not pleaded by him.*

- 6 The results are these: 1. If plaintiff's complaint discloses the existence of a defence it must also contain matter in avoidance of that defence.

2. Plaintiff is not bound to plead any common law avoidance of an anticipated defence not disclosed by his own complaint. He may state facts as his cause of action, although he knows defendant has an apparent answer to them, and may reserve his avoidance of that answer till the trial, provided that avoidance does not require affirmative equitable relief against the matter set up as a defence; in other words, provided it is a good avoidance at common law.

- 7 The cases are not agreed as to whether an equitable avoidance is thus available without pleading. The later cases favor the rule that if there is an obstacle to recovery which cannot be avoided except by equitable relief, the plaintiff should frame his action as an equitable one, and allege his avoidance and ask relief against the matter of defence thus to be avoided.

3. If plaintiff does not indicate by his pleading how he intends to avoid a defence, and defendant can show that the facts of his defence are clear and that he is embarrassed in preparation for trial by being left in the dark as to how plaintiff will endeavor to avoid their effect, the court may compel plaintiff to reply, and, of course, confine his avoidance on the trial to the matters alleged in the reply.

4. Plaintiff may, if he choose, allege in his complaint an avoidance of an anticipated defence, even though it be an avoidance good at common law and therefore not necessary to be alleged.

- 8 This conclusion has been contested, and while the weight of reason and authority is in its favor, it is to be taken with the important qualification that if defendant does not plead the anticipated defence, the allegations intended in avoidance are left without pertinence, are not admitted

* *Chapman v. Webb*, 6 How. Pr., 390. Action for price of goods; answer of credit unexpired; amendment setting up fraud in procuring credit allowed.

Hollister v. Livingston, 9 How. Pr., 140. Action on sealed note, answer of usury; amendment setting up original consideration. Objection, if any, held waived by retaining the amended complaint sixteen days.

Thompson v. Minford, 11 How. Pr., 273. Action on note; amendment alleging judgment recovered thereon in another State allowed, because, if not allowed, defendant might plead it in bar; and if allowed and the allegations as to the note stand out, defendant might plead want of jurisdiction against the judgment.

Winchester v. Browne, 26 Abb. N. C., 887.

by not being denied, and are so much surplusage. Hence, if defendant disavows intent to plead that defence, he could move to strike out the anticipated avoidance. 9

If, however, defendant does plead the anticipated defence, he makes the allegations in avoidance material, precisely as in the case of pleading in equity, and he must deny them or they will stand admitted.

This rule, it will be seen, does not rest directly on any provision of the Code, but on the old practice and reasons of convenience which favor allowing the parties to narrow as much as they will the issues to be tried.*

In view of these principles the usual policy of counsel in framing the pleadings in such cases is this :

If an anticipated defence will require equitable relief, allege the facts 10 in avoidance and ask that relief.

Where an anticipated defence can be met by a common law avoidance and needs no equitable relief, then if it is expected that defendant will go to issue in any case and contest a recovery, frame the complaint as if the defence did not exist, and reserve the avoidance until trial ; but if the defence is supposed to be the only one, and defendant cannot under oath deny either the cause of action or the avoidance, allege the matter in avoidance in the complaint. and then if he pleads that defence he must admit or deny the matter in avoidance.

WINCHESTER v. BROWNE.

New York Supreme Court, Special Term, 1891.

[Reported in 26 Abb. N. C., 887.]

Under an order directing plaintiff to reply to new matter in an answer, a denial is a sufficient compliance ; but it will only avail at the trial to enable plaintiff to controvert the new matter, and not to prove an avoidance thereof.

Demurrer to reply. 1

BARRETT, J. Where the plaintiff is directed to reply to new matter in his answer, constituting a defence by way of avoidance, the reply is subject to the same rules as in the case of a counterclaim (Code, § 516). Those rules are that the reply must contain

* In *Williams v. Kilpatrick*, 21 Abb. N. C., 61, plaintiff sued defendants as general partners. One of the defendants denied he was a general partner, and alleged that he was a special partner under a limited partner-ship. His attorney then moved that plaintiff be directed to reply to the new matter. The court granted the motion, on the ground that where a violation of a statute is the basis of liability, the specific grounds should be pointed out, in order to raise a precise and definite issue.

Winchester v. Browne, 26 Abb. N. C., 387.

- 2 a general or specific denial of each material allegation controverted by the plaintiff or any knowledge or information thereof sufficient to form a belief, and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defence to the counterclaim (Code, § 514). Where, then, the plaintiff, upon the direction of the court, replies to new matter in avoidance, there must be
- 3 either a general or specific denial of such new matter or of any knowledge or information thereof sufficient to form a belief. If no such denial is interposed, the new matter is admitted. But if a denial be interposed in any one of the forms so prescribed, the defendant cannot successfully demur to the reply upon the ground that it is insufficient in law upon the face thereof (§ 493). It is sufficient in law because it is in precise accord with the forms of denial prescribed by law.

- The defendant complains that the reply does not apprise him of the manner in which the plaintiff intends upon the trial to meet the plea of the Statute of Limitations. This is but another
- 4 way of saying that the plaintiff should have admitted the defendant's new matter in avoidance, and set forth in his reply, in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defence to such new matter in avoidance. The answer to this is, that the plaintiff thus relies upon his general or specific denial, or upon his denial of knowledge or information sufficient to form a belief. Upon the trial he will not be permitted to show new
- 5 matter constituting a defence to the defendant's new matter in avoidance, for the reason that he has not pleaded it. The issue will be upon the denial of the defendant's averments.

Tested by these rules, the reply is sufficient in law upon its face, and the demurrer thereto should therefore be overruled, with costs.

Ansorge v. Kaiser, 22 Abb. N. C., 305.

ANSORGE v. KAISER.

New York Supreme Court, Special Term, 1889.

[Reported in 22 Abb. N. C., 305.]

1. The fact that a prior action is pending on a cause set up in the present action as a counterclaim and for which affirmative judgment is demanded, is a defence to the counterclaim.
2. *It seems*, that if the pendency of such prior action should appear upon the face of the counterclaim, the counterclaim would be demurrable.
3. If the pendency of a prior action upon the cause set up as a counterclaim does not appear upon the face of the counterclaim, plaintiff may set it up by a reply.

Defendant demurred to a reply which plaintiff had interposed 1
as a defence to a cause of action which defendant had set up in
her answer by way of counterclaim.

INGRAHAM, J. The counterclaim set up in the answer alleges
a breach of warranty and demands an affirmative judgment
against the plaintiff for the sum of \$800. The reply to such
counterclaim alleges that a prior action is pending undetermined
for the same cause of action alleged in said counterclaim between
the same parties in this court, and to that reply the defendant 2
demurs.

By Section 495 of the Code, it is provided that a plaintiff may
demur to a counterclaim upon which the defendant demands an
affirmative judgment, where it appears upon the face of the
counterclaim "that there is another action pending between the
same parties for the same cause."

If, therefore, it had appeared in the allegation constituting
this counterclaim that a prior action was pending for the cause
of action alleged as a counterclaim, the plaintiff could have
demurred to the counterclaim. By section 514 it is provided 3
that where the answer contains a counterclaim, the reply may set
forth in ordinary and concise language, without repetition, new
matter not inconsistent with the complaint, constituting a defence
to the counterclaim.

I think it is clear that facts which, if they appeared upon the
face of the counterclaim, would make the counterclaim demur-

Ansorge v. Kaiser, 22 Abb. N. C., 305.

4 rable and defeat the cause of action set up as a counterclaim, when they do not so appear, is new matter constituting a defence to the counterclaim, for it would be absurd to suppose that the Legislature intended that a fact appearing on the face of the counterclaim should defeat the counterclaim, but should not defeat it where the fact did not so appear, but was alleged in the reply.

The rule was different where the cause of action was alleged in the answer by way of set-off, and not by way of
5 counterclaim, and the case of *Naylor v. Schenk* (3 E. D. Smith, 135) applied the rule to the defence of set-off, and not to a counterclaim.

It is settled in this court that a plea of another action pending between the same parties for the same cause is a good defence to the action (*Groshon v. Lyon*, 16 Barb., 461). And under the provisions of the Code above cited, I think it also a defence to a counterclaim for which an affirmative judgment is demanded.

The cases cited by defendant have been examined, but, so far
6 as they are inconsistent with the rule before stated, they should not prevail against the express language of the Code cited. The demurrer should, therefore, be overruled and judgment ordered for plaintiff with costs, with leave to the defendant to withdraw the demurrer within twenty days, on payment of costs.

Goff v. Star Printing Co., 21 Abb. N. C., 211.

GOFF v. STAR PRINTING CO.

New York Supreme Court, Chambers, April¹, 1888.

[Reported in 21 Abb. N. C., 211.]

1. An unverified answer to a verified complaint may be served without any affidavit to the ground of privilege, where the pleadings themselves show—as in the case of an action for libel and an answer denying publication—that the defendant would be privileged from testifying as a witness. It is only where the complaint does not itself show this that such an affidavit is required.
2. This rule applies in an action against a corporation, though the verification in such case would be by an officer.

These actions, four in all, were brought to recover \$25,000 damages in each case, aggregating \$100,000, for the publication in the "Star" newspaper of an article concerning the plaintiffs, alleged by them to be libelous. The four complaints were duly verified. The defendant answered in each case, the answers each containing, with other defences, a general denial of all the allegations of the several complaints. The answers were not verified. On being served, plaintiffs' attorneys gave admission of due and timely service, but within two or three days gave notice to defendant's attorney that they would treat the answers as nullities upon the ground that, the complaints being verified, the answers should be verified; the defendant not being entitled to the privilege and exemption from verification, under N. Y. Code Civ. Pro., § 523.*

Defendant then moved to compel plaintiffs to accept the service of the answers.

O'BRIEN, J. These actions, as shown by the complaints, are for alleged libels. The answers are unverified. Section 523 of

* This section is as follows: "§ 523. Where a pleading is verified, each subsequent pleading, except a demurrer, or the general answer of an infant by his guardian *ad litem*, must also be verified. But the verification may be omitted in a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying as a witness concerning an allegation or denial contained in the pleading. A pleading cannot be used in a criminal prosecution against the party as proof of a fact admitted or alleged therein."

Goff v. Star Printing Co., 21 Abb. N. C., 211.

- 4 the Code of Civil Procedure provides that "the verification may be omitted where the party pleading would be privileged from testifying as a witness concerning an allegation or denial contained in the pleading."

Some of the cases are to the effect that the court will not assume, merely from the pleadings, that the reason why an answer was not verified was that the party answering would be privileged from testifying as a witness, and it therefore seemed proper that where this right is claimed the party claiming it should serve an affidavit showing his excuse for not verifying the answer. An examination of the cases will, however, bear the construction that a distinction is made between cases where the complaint itself does not show that the defendant would be privileged, and cases, which from their very nature, it is evident that the defendant could not be compelled to testify. In the former class of cases an affidavit should be served, showing why the verification is not made. In an action for libel, where the answer denies the publication, no verification is required; and, as it is evident from the complaint in this action that the defendant or its officers would be privileged from testifying, an unverified answer, without any affidavit, is good (*Wheeler v. Dixon*, 14 How. Pr., 151). Where there is more than one party and any one would be privileged, verification may be omitted (*Clapper v. Fitzpatrick*, 3 How. Pr., 314).

- 6 The motion should be granted, for the reason that the verified pleading would tend to accuse the officers and the corporation of a misdemeanor, and expose the officers and the corporation to a penalty or forfeiture. If called as witnesses, they would be privileged from testifying to the truth of any matter denied.

7 Motion compelling plaintiff to accept answer granted; no costs.

NOTE.—In *Fredericks v. Taylor*, 14 Abb. Pr. (N. S.), 77 (N. Y. Court of Appeals, 1873), it was held:

1. The question whether or not a pleading must be verified is one of substantial right.
2. A party has the right to have such a question determined summarily upon a motion; and consequently an appeal lies to the Court of Appeals from the order made on such motion.

Goff v. Star Printing Co., 21 Abb. N. C., 211.

In delivering the opinion of the Court, GROVER, J., said on these 8
points :

That the question whether or not a pleading must be verified, is one of substantial right, is, I think, clear. If the law required that it should be verified, the party upon which it is served has an absolute right to insist that it shall be, to constitute a pleading in the cause. If it does not require a verification, the party serving it has an absolute right to serve it without, and to insist that it shall be treated as a valid pleading.

Whether the order is appealable depends upon the inquiry whether a party has an absolute right to have the question, whether the proposed pleading complies with the law and the practice of the court, and has been properly served, determined in the one case by a motion to strike it out, and in the other, where there has been a refusal to receive it, by 9
motion to compel its acceptance as a pleading in the cause ; or whether it is discretionary with the court either to decide the question upon motion, or leave the parties to the remedy of returning the pleading, in the former case, and taking subsequent steps in the cause upon the ground that there was no such pleading, and have the question determined upon the motion of his adversary to set aside such subsequent proceedings, or, in the latter, wait until subsequent proceedings are had, and then move to set the same aside. I think that the correct and better practice is, that when a question arises whether a pleading has been made and served according to law and the practice of the court, so as to become a part of the pleadings in the case, to give either party the right to a speedy and summary 10
determination of the question upon motion, without requiring either to take any further proceedings in the cause, at the peril of having them set aside in case of a decision adverse to him, or of permitting a final judgment to stand in case the paper tendered was not sufficient or in time. I believe the uniform practice of all the courts is in accordance with these views, and that such a motion was never denied upon the ground that it was in the discretion of the court whether it would consider and determine the question presented upon motion, or compel the parties to proceed further in the cause, relying upon the respective views of each upon the controverted question.

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Reubens v. Ludgate Hill S. S. Co., 21 Abb. N. C., 464.

For a note on the distinction between motions to make more definite and certain, or for a bill of particulars, see p. 239 of this vol.

REUBENS v. LUDGATE HILL STEAMSHIP CO.

New York Supreme Court, First Dep., General Term, 1888.

[Reported in 21 Abb. N. C., 464.]

A complaint in an action against a common carrier of goods for negligence, which alleges that "the defendant so negligently and carelessly behaved itself in transporting said fur that the same was damaged," etc., is indefinite and uncertain and a motion to make it more definite and certain will be granted.*

- 1

Morris Reubens and Bernhard Reubens sued the Ludgate Hill Steamship Company (Limited), a common carrier of goods, to recover damages for negligence in transporting fur in one of its vessels.

The complaint after alleging, 1. that defendant was a foreign corporation; 2. the co-partnership of the plaintiffs, then proceeded as follows:

- 2

Third.—That on or about June 22, 1887, the defendant undertook to transport to New York, for hire, by one of its vessels, called the "Ludgate Hill," ninety cases of fur, the property of the plaintiffs, and to deliver the same safely and in good order to the plaintiffs at said city of New York, and that plaintiffs paid the defendant for such freight \$178.77.

- 3

Fourth.—That the defendant so negligently and carelessly misbehaved itself in transporting said fur that the same was damaged, and plaintiff, by reason thereof, sustained damage in the sum of \$408.51.

Judgment was demanded for \$408.51, with interest and costs.

* This decision must be deemed a warning to pleaders to state the facts relied on as constituting negligence, with some detail if practicable safely to do so. Compare note in 20 Abb. N. C., 236, and group of cases there reported.

Code Civ. Pro., § 546, reads: "Where one or more denials or allegations contained in a pleading are so indefinite or uncertain that the precise meaning or application thereof is not apparent, the court may require the pleading to be made definite and certain by amendment.

III. *Technical Rules.* (9 a) Indefiniteness and Uncertainty. 541

Reubens v. Ludgate Hill S. S. Co., 21 Abb. N. C., 464.

The defendant moved for an order requiring the plaintiff to make the complaint more definite and certain by specifying and pointing out when, where, how, under what circumstances, and in what way, manner and particulars the alleged damage to the plaintiffs' goods was incurred, and in what the said damage consisted, and in what the alleged negligence and misbehavior of the defendant referred to in the fourth article of the complaint consisted. 4

The Special Term, in denying the motion, rendered the following opinion : 5

"This motion must be denied for the reason that it is well established that negligence may be charged in general terms, and while under the practice in some States, if a more definite statement of facts is desired, a motion to the court to make the complaint more specific, is proper, under our practice, it is only where the precise nature of the charge is not apparent that such an application is proper to make the complaint more definite and certain. But where the particulars or circumstances of time or place, or, as in this case, where defendant desires to have specified where, how, and under what circumstances, or the particulars of the alleged damage, the proper practice is to demand a bill of particulars, and on that being refused, to make a motion to obtain it (*Tilton v. Beecher*, 59 N. Y., 176, and pp. 183 and 184)." 6

The General Term reversed the order and granted the motion.

BRADY, J. The defendants are alleged to be common carriers for hire between London, in England, and this city. The allegation is that on June 22, 1887, the defendant undertook to transport to New York for hire, by its vessel called the "Ludgate Hill," ninety cases of furs, the property of the plaintiffs, and to deliver the same safely and in good order to the plaintiffs at the city of New York; for which service the defendant was paid; and then that "the defendant so negligently and carelessly misbehaved itself in transporting the fur that the plaintiff, by reason thereof, sustained damage in the amount stated." 7

The defendant insists that this is a very indefinite and uncer-

Reubens v. Ludgate Hill S. S. Co., 21 Abb. N. C., 464.

8 tain statement of the cause of action, and it seems to be so. It is a natural logical sequence that if defendant carelessly and negligently misbehaved itself it behaved itself, and, it must be assumed, well behaved itself.

This must be the result. This view, which is not intended to be hypercritical, is only given for the purpose of demonstrating the uncertain and indefinite allegation of the cause of injury.

9 It is not necessary to consider the authorities upon a motion of this character, which create, when put in juxtaposition some confusion, involving, to some extent, rules applicable to bills of particulars, for the reason, if none existed, that the Code requires by section 481 a plain and concise statement of facts constituting each cause of action, without unnecessary repetition. And the Court of Appeals in *Olcott v. Carroll*, 39 N. Y., 436, said in reference to the old Code, the provisions in which are similar to those contained in the Code of Civil Procedure: "When the allegations in a pleading are so indefinite and uncertain that the express nature of the charge is not apparent, the court may require the pleading to be made definite and certain by an amendment." Here the plaintiffs' right of action depends on the
10 alleged negligence of the defendant, and, giving the broadest and most liberal interpretation to the allegations in the complaint on that subject, there is no suggestion of any fact showing the character of the negligence, whether by improper stowage, or careless handling, or negligent exposure, or of any one of the numerous acts, omissions, and circumstances by which negligence would be made apparent. The statement is, that the goods were so shipped and so negligently transported as to be damaged. This is neither a plain nor concise statement of facts, and the
11 precise nature of the charge is not apparent.

Whether the defendant was guilty of negligence or carelessness is a conclusion of law dependent upon facts which must be proved. There should be at least some general statement of the cause of the damage, beyond the mere statement of neglect and carelessness. Some confusion has crept into the consideration of this question, by the supposed effect upon it of the case of *Tilton v. Beecher*, 59 N. Y., 176. The learned justice in writing the opinion in that case, referring to section 160 of the old Code,

III. *Technical Rules.* (9 a) Indefiniteness and Uncertainty. 543

Ottman v. Fletcher, 28 Abb. N. C., 430.

the provisions of which were similar to those of section 546 of 12
our present Code, said: "It will be observed that it is only
where the precise nature of the charge is not apparent that an
application will be made under this section. It enables a party
to obtain a definite statement in the pleadings of the nature of
the charge intended to be made against him, but not of the par-
ticulars or circumstances of the time and place. For that
purpose, a different proceeding was pointed out, and from that
there was no uncertainty and indefiniteness in respect to the
nature of the charge made against the defendant."

13

Indeed an examination of that case shows that the charge
made was quite definite and certain. That case, and cases
kindred to it, establish the proposition that in an action of or
for relief, if the charge made be definite and certain, an applica-
tion for a bill of particulars may be granted. But it in no wise
limits, controls or affects the statutory right secured by the pro-
visions of the Code, to have a complaint made so definite and
certain that the nature of the charge shall be stated.

The object is to advise the defendant of the claim with such
definiteness as to enable him to prepare his defence. This 14
would be required in all other classes of cases and should be here.
For these reasons, the order appealed from is reversed, and the
motion granted with costs.

DANIELS, J., concurred.

BARTLETT, J., concurred in the result.

Order reversed.

OTTOMAN v. FLETCHER.

New York Superior Court, Special Term, 1889.

[Reported in 28 Abb. N. C., 430.]

1. Under Code Civ. Pro., § 481, a defendant is entitled to be informed by the complaint of the facts constituting the plaintiff's cause of action, and it is not an answer to a motion to make a complaint more definite and certain that the defendant has become acquainted with all the facts upon which plaintiff's claim is founded in another action relating to the same subject matter.

Ottman v. Fletcher, 23 Abb. N. C., 480.

2. A complaint alleging a modification of a contract will be required to give the substance or full terms of the alleged modification, but not to state the time and place and whether or not by a writing.

- 1 The complaint, after alleging that a contract was made between plaintiff and one Caffee for the manufacture by plaintiff and the delivery to said Caffee of a certain number of advertising and playing cards, a certain sum to be paid down on the making of the contract, and the balance to be paid on delivery of the cards, stated that the original contract was modified to the extent that a less number of cards should be delivered than was originally provided for. Paragraph 5, among other things, alleged "that the defendant on the day said contract was made, guaranteed in writing the payment" under said contract.

2 Defendant moved to make the complaint more definite and certain by stating in what respect the contract alleged in the complaint was modified, whether such modification was in writing, the time and the place of such modification, the full terms of the same, and whether the words "said contract" in paragraph 5, referred to the original contract or to the modified contract.

- 3 DUGRO, J. I think the complaint should be made more definite and certain by giving the substance or full terms of the alleged modification, and also by stating whether the words "said contract" in paragraph 5, refer to the original contract or to the same as modified. The precise meaning and the application of the allegations of the complaint are apparent, without a specification of the time and place of the alleged modification, or any statement as to whether this modification was in writing, and
- 4 therefore the defendant's motion, so far as it asks for information as to these particulars, should not be granted (See *Tilton v. Beecher*, 59 N. Y., 176). In *Betts v. Bache* (23 How. Pr., 197), it is held that it is not necessary in a pleading to state a contract within the Statute of Frauds to be in writing. As to the contention of plaintiff's counsel that the defendant is well aware of all the facts upon which the plaintiff's claim is founded, by reason of another action, etc., it is sufficient to say that the defendant is entitled to be informed by the complaint of the facts constituting

Blanchard v. Jefferson, 28 Abb. N. C., 236.

the plaintiff's cause of action (§ 481 Code Civ. Pro.). He may 5
have reason to know the nature of the plaintiff's claim aside from
the pleadings, but it is his right to rely only upon that which ap-
pears in the complaint itself. An order in accordance with the
above will be granted, without costs.

BLANCHARD v. JEFFERSON.

New York Supreme Court, General Term, First Dep., 1892.

[Reported in 28 Abb. N. C., 236.]

- I. A complaint alleged that on the dissolution of a co-partnership between plaintiff and defendant, a balance was struck, and what was due the retiring partner was left by him with defendant, his co-partner, as a loan; and that the retiring partner was thereafter employed by the other on a salary; and that upon the amount due for the loan and salary, various sums had been paid to plaintiff, and that a specified balance remained due,—*Held*, that the complaint set forth not a single cause of action for an accounting, but two, namely, the loan and the claim for salary, which, not arising out of the same transaction, were distinct causes of action; and a motion to compel separate statements must be granted.
2. In stating such causes of action separately, it need not, however, be alleged what amount was paid upon each cause of action, or what was due upon each: but it is proper after stating the causes of action separately to plead the payments and balance due plaintiff as facts common to both causes.

Appeal from an order of the Special Term requiring plaintiffs 1
to make their complaint more definite and certain. The action
was brought by Henry B. Blanchard and others against Susan
Jefferson individually and as executrix.

The complaint alleged that the defendant and plaintiff's
testator entered into a co-partnership in 1874, and that the
co-partnership was continued until January, 1881, when it was
dissolved by mutual consent, and upon the date of the dissolution
the accounts between the co-partners were settled and balanced,
and there was due the plaintiff's testator \$14,651.92 from said

Blanchard v. Jefferson, 28 Abb. N. C., 236.

2 co-partnership and that it was agreed between the defendant and plaintiff's testator that such balance should remain on deposit in the business and as a loan to the defendant at the legal rate of interest.

The complaint further alleged that thereafter the plaintiff's testator was employed by the defendant at a salary of \$3,000 per annum, and that from time to time various amounts were paid to plaintiff's testator on account of said salary and on account of his said deposit until 1887, since which time no payments have been made, and that there is due for and on account of said
3 deposit and said loan the sum of \$16,845.06.

Defendant moved the court below to make the complaint more definite and certain by separately stating and numbering the facts constituting each cause of action set forth in the complaint, and the court made an order requiring the plaintiffs to make the complaint more definite and certain by separately stating and numbering the facts constituting each cause of action set forth in said complaint, and alleging and stating the amount paid by the defendant for and on account of each cause of action
4 and the amount claimed by the plaintiffs for and by reason of each cause of action alleged in said complaint.

O'BRIEN, J. [*stating the facts as above*]. The question presented upon this appeal is necessarily dependent upon one or the other of two views we may take as to whether the complaint states one or two causes of action.

If the appellant's contention is correct, that but one cause of action is set forth, namely, an action for an accounting, then the order appealed from should not have been made.

5 We do not think, however, that the complaint can be so construed. It seems to us that the complaint contains two causes of action, one for an alleged balance claimed to be due upon the dissolution of the co-partnership, which was deposited with the defendant as a loan, and the other for salary claimed to be due said plaintiff's testator on a contract of employment after the dissolution of the co-partnership.

These two causes of action are independent, distinct and separable. They did not arise out of the same contract or trans-

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action, but each arose out of separate, distinct and independent 6
acts and contracts.

One cause of action is purely for money loaned, and the other
for salary under a contract of employment.

If our construction of the complaint is right, it would follow,
under section 483 of the Code, that the facts constituting each
cause of action should be separately stated and numbered. So
much, therefore, of the order as requires this should be affirmed.

But the remainder of the order, which requires that the com-
plaint should allege and state the amount paid by the defendant
for and on account of each cause of action, and the amount 7
claimed by the plaintiff for and by reason of each cause of action
alleged in said complaint, should be reversed for the reason that
it is entirely competent, after stating two separate and distinct
causes of action, for the plaintiff to allege that there was paid
thereon from time to time an amount which can be specified, and
that there is a balance due thereon as claimed in the complaint.

That this form of pleading is correct is shown by the facts
appearing that the amounts due upon these two several causes
of action were from time to time lessened by payments made 8
thereon which were not appropriated by either the debtor or
creditor to either claim in particular; so that it would be impos-
sible for the plaintiff to state just what amounts were paid on
one or the other of these claims.

It would appear that the credit was given the plaintiff by the
defendant for the amount of both claims, and from time to time
as moneys were paid they were debited against the credit thus
created and the balance held as the amount due plaintiff upon
both claims.

The order appealed from should be modified accordingly, 9
without costs to either party on this appeal.

VAN BRUNT, P. J., and PATTERSON, J., concurred.

Difference between an Action on an Account and for an Accounting.

NOTE ON THE DIFFERENCE BETWEEN AN ACTION
ON AN ACCOUNT AND FOR AN ACCOUNTING.

- 1 An action *on* an account stated, or for a debt resting in account, is quite different from an action for an accounting. The latter is appropriate where defendant stands in a relation or under a contract which imposes upon him the affirmative duty of *rendering* an account, and substantiating its items. The burden is on plaintiff to prove that defendant is under a duty to account. This is to be done at the hearing, and if the duty is made out an interlocutory judgment requiring defendant to perform this duty is awarded, and the cause then proceeds, usually before a referee, to have the account taken and stated, and in this part of the case the burden is on defendant to render and support the account, as it has been adjudged to be his duty to do. Such a cause of action is appropriate for a bill in equity, and, under the Code, for an action of an equitable nature, and in such action an arrest may be granted by the court if defendant threatens to leave, etc., and thus render the desired interlocutory judgment fruitless (Code Civ. Pro., § 550). And interlocutory judgment may usually be enforced by proceedings for contempt (§ 1242).
- 2

- An action upon an account stated (see *Graham v. Camman*, p. 91 of this vol.), or for a debt resting in account (see *Ensign v. Nelson*, p. 287 of this vol.), is an action on a common law cause of action in which the burden is on the plaintiff to prove not only his right to recover, but the amount also; and the cases in which equity has jurisdiction are only those where the account is so complex that a jury is not a fit tribunal to try the cause; and even then, under our statutes allowing a reference of such causes, it is discretionary for a court of equity to decline to exercise its concurrent jurisdiction and leave the plaintiff to an action of a common law nature.
- 3

- This very sensible decision accords in principle with other recent decisions that facts which are matter of inducement to each of several causes of action, such as the incorporation of a party, or the legal capacity of a party executor, etc., may be stated in a preliminary or introductory part of the complaint, before the "separate statement" of each cause of action, and without being repeated in them. The rule that each cause of action must be stated so as to be complete in itself, either by embodying all the necessary facts, or by express reference to a preceding cause of action in which they are stated, I understand to be a rule of judicial convenience founded on the fact that otherwise the striking out of one cause of action by motion or its withdrawal might leave a complaint insufficient on its face. But such results cannot follow where the facts common to several causes of action are stated once for all, either, as in the case of capacity of parties, in the beginning of the complaint, and before commencing the statement of the first cause of action, or, as in case of unappropriated payments, stated at the end of the complaint after the close of the last cause of action, as in the text. It is upon the same principle that one demand of relief suffices for several causes of action.
- 4

People v. Tweed, 68 N. Y., 194.

PEOPLE v. TWEED.

New York Court of Appeals, 1875.

[Reported in 68 N. Y., 194.]

1. In an action to recover from defendant moneys which he and others acting as public officers had peculated from a city treasury by neglect to audit, and by auditing and allowing exaggerated and excessive claims, defendant is not entitled as matter of right to a bill of particulars showing what part of each claim is alleged to be excessive and fraudulent; but the question whether particulars should be furnished is in the discretion of the court, and its order therefore will not be reviewed in the Court of Appeals.
2. If defendant, on moving to correct the plaintiff's complaint, takes an extension of time to answer or demur, until a specified period after the amended complaint sought for shall have been served, and, on an appeal from an order granting this relief, he obtains no stay of proceedings or other extension, his extension falls with the reversal of the order by the General Term; and if the time to answer or demur has then expired, he is in default.
3. The General Term on reversing the order may impose such terms respecting leave to answer or demur as it may deem proper.
4. In a complaint to recover from defendant moneys peculated by conspiracy between himself and others, obtaining payment of unaudited claims or excessive claims fraudulently audited, allegations of negligence and of fraud are not separate causes of action, but only a statement of various means by which the conspiracy was carried out.
5. In such case the various claims or payments are not separate causes of action, but they may all be regarded as a series of acts in connection with the general conspiracy alleged. *So held*, even though only one of the alleged conspirators was made defendant, and although the various acts might have been treated as separate offenses on an indictment in a criminal action.
6. In such a case the city from whose treasury the moneys have been embezzled had been joined as a co-defendant, upon a mere general allegation that it had or claimed some interest in the demand sued on. *Held*, that the principal defendant had no right to require this general allegation to be made more definite and certain.

The people of the State brought an action against William M. Tweed and others to recover moneys which he, in confederation with others as officers of the city and county of New York, had peculated from the city treasury; and the action was held not maintainable because the people were not the proper plaintiffs. (People v. Ingersoll, 58 N. Y., 1.) 1

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- 2 The Legislature then passed an act (L. 1875, p. 43, c. 49), known as the Peculation Act, or Tilden Act, and which has been since then embodied in Code Civ. Pro., §§ 1969, 1971, etc. (and the right to arrest and attachment in which was secured by §§ 637 and 549, sub. 3, respectively).

Under that act of 1875, the people brought this second action against Tweed for the same cause, seeking to recover upwards of six millions of dollars; and joined the city as a co-defendant.

- 3 The nature of the complaint appears in the above head-notes; it closed with this allegation, "That the said defendants, 'The Mayor, Aldermen and Commonalty of the City of New York,' set up and pretend to some right or interest in the premises."

Annexed to the complaint were schedules of numerous warrants paid, and of the claims alleged to have been unaudited or fraudulently audited.

- 4 Defendant made several successive motions, which were, however, heard together as one—seeking a bill of particulars of what parts of the accounts and claims were claimed to be false, fictitious or fraudulent; also to have the complaint made more definite and certain as to what right or interest the city claimed; also to have it made more definite and certain whether every claim mentioned was fraudulent, and in what respect, and whether wholly so or in respect to an excess, and if the latter, what part; also to set aside the complaint because several causes of action were not separately stated and numbered; also to strike out as irrelevant and redundant parts relating to the alleged neglect to audit, and parts alleging any conspiracy; also to compel plaintiffs to elect which of the 151 claims they would proceed for, and to strike out the others; also to compel them to elect
- 5 whether to proceed for neglect to audit, or for fraudulent auditing.

After the argument of the motions, and before the decision, plaintiffs' attorney gave defendant the following stipulation: "It is hereby consented that the time for the defendant Tweed to answer, demur or take any other action which he may be advised is extended until five days after the entry and notice of an order upon the motions argued before Mr. Justice Donohue, on June 1, 1875."

The Supreme Court at Special Term made an order of which 6
the ordering parts were as follows :

" *First.* That the plaintiffs serve upon the attorneys for the defendant Tweed, within twenty days from the entry of this order and notice thereof, an amended complaint, wherein :

" 1. They shall specify what right or interest in the premises The Mayor, Aldermen and Commonalty set up or pretend to.

" 2. They shall either strike out so much of the complaint as sets forth the alleged neglect to audit the claims against the city, and especially that portion thereof [*here referring to allegations of neglect to audit*], or shall state in the complaint that they do 7
not rely upon the neglect to audit as a cause of action ; or if they elect to sue for the alleged neglect, they shall strike out so much of the complaint as sets forth any fraud, conspiracy or combination on the part of the said Tweed and Watson.

" *Second.* That the plaintiffs serve upon the attorneys for defendant Tweed, within twenty days from the entry of this order and notice thereof, a bill of particulars of the plaintiffs' claim setting forth in full and in detail, first, the whole of such parts of, and items in, each of the bills, accounts, vouchers or warrants 8
mentioned in the complaint as they claim to have been false ; and, second, the whole or such parts of items as they claim to have been fictitious ; and, third, the whole of such parts of items as they claim to have been fraudulent ; and setting forth in each case the parts, portions or items of such bills, accounts, vouchers or warrants as they claim represent supplies, materials or labor not furnished to the plaintiffs, giving the description, date and amount thereof, and such parts, portions or items as they claim to have been overcharged, or in any other respect false or erroneous, 9
stating the amounts and descriptions of supplies, materials and labor actually charged, and the prices at which they were charged, and also setting forth the prices at which it is claimed they should have been charged.

" *Third.* That so much of said motions as are not hereby granted are denied.

" And it is further ordered that the time for the defendant Tweed to answer, demur or take any other action to which he may be entitled, is extended until the expiration of twenty days

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10 after such amended complaint and such bill of particulars shall have been served upon his attorneys."

Plaintiffs appealed to the General Term from the whole of this order except so much as denied a part of the motions; and from that part defendant Tweed appealed.

The General Term reversed the order of the Special Term so far as it granted any of defendant's motions, and affirmed it so far as it denied them.

11 DAVIS, P. J. [*in the course of his opinion said*]: It would, under the former system of practice, have been sufficient to have averred an indebtedness for so much money had and received to and for the use of the city, and under such averment to have shown the process by which Tweed and his confederates obtained the money which, *ex æquo et bono*, he and they are bound to return.

The complaint in this case sets forth in larger detail substantially the same grounds of action, and it avers the process and pretenses under and by means of which the wrongdoers are
12 alleged to have gotten possession of the money; and as a part of them it shows that Tweed held an official position, in which it was his duty to have audited all claims of that kind against the county of New York, and thereby protect the treasury against false claims, and that he used that position—by a false pretense of auditing when in fact no audit was made—as one of the steps to enable himself and his co-conspirators to defraud the county of the moneys now sought to be recovered. There are in the complaint no separate causes of action; and the mere recital of the various acts and practices, official or individual, cannot with
13 propriety be said to be the averment of distinct and inconsistent causes of action. If the pleader, for greater caution, has gone more largely into detail in describing the process and progress of the fraud set forth, that is no good reason for compelling him to elect between several allegations, all of which only lead up to the general averment which constitutes the real gravamen of his complaint. The order striking out or compelling an election can have no other effect than to embarrass the case on the trial by restricting the evidence essential to a complete history of

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the transactions to such portions as may be contained in the aver- 14
ments which will still remain in the complaint.

* * * * *

There are several substantial reasons why those portions of the order which require the service on the defendant's attorneys of the bill of particulars specified therein should not be allowed to stand. First, it is clearly apparent, from the papers before us, that it is not in the power of the plaintiffs to comply with many of the requirements of the order. It is shown that, to a great extent, the conduct of the defendant has made such compliance impossible. It is not contradicted that he required 15
or instigated his confederates to burn and destroy the books and papers which contained all the entries that existed of any real claims. Not only the books and papers that contained such comparatively inconsiderable items are thus put beyond the reach of plaintiffs, but the enormous false accounts which were presented, and upon which the moneys sued for were obtained, are shown to have been, with a slight exception, feloniously taken from the public custody, and doubtless destroyed, by some person interested in their destruction. Upon 16
these uncontradicted statements of the papers the defendant stands as a despoiler of evidence, and his right to demand particulars of the contents of books and papers of his confederates rests on no solid foundation. He should, at least, exculpate himself from all connection with the spoliation, and establish with satisfactory certainty that the plaintiffs have the means of furnishing the particular contents of the destroyed books and accounts before he asks that their suit be perpetually arrested till such particulars be served. Second, the order requires that the bill of particulars shall not only set forth the 17
particulars of plaintiffs' claims, but shall set forth "in full and in detail, first, the whole of such parts of, and items in, each of the bills, accounts, vouchers or warrants mentioned in the complaint as they claim to have been false; and, second, the whole or such parts of items as they claim to have been fictitious; and, third, the whole or such parts of items as they claim to have been fraudulent; and setting forth in each case the parts, portions or items of such bills, accounts, vouchers and warrants as they

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18 claim represent supplies, materials or labor not furnished to the plaintiff, giving the description, date and amount thereof, and such parts, portions or items as they claim to have been over-charged, or in any other respect false or erroneous, stating the amounts and descriptions of supplies, materials and labor actually charged and the prices at which they were charged, and also stating the prices at which they should have been charged."

The plaintiffs were not parties to the original transactions. Although strangers to them, they are clothed by law with power to sue, as *parens patriæ*, in cases of such alleged frauds, in order
19 that public wrongs may not go unredressed. If all the papers, books and vouchers referred to in the order, or from which the particulars demanded must be obtained, were in existence, they would still be the public documents of the city of New York or the private books and papers of the alleged confederates of the defendant Tweed ; and in that case it would not be the legitimate office of an order for a bill of particulars to require what is demanded by this order. The defendant would be directed to seek such facts where the plaintiffs must themselves seek them,
20 in the documents, books and papers not under the control of plaintiffs, but in the public records or private books and papers of others. A different rule would put it in the power of the defrauding parties to make all efforts of the State to recover under the Act of 1875 difficult and perhaps wholly nugatory. The collusion of officials or the connivance of the confederates in wrong, by doing precisely what appears in this case to have been done, would put it in the power of a party sued, by obtaining such an order as that above recited, with a stay of all proceedings till compliance with it on the part of the plaintiffs, to defy the
21 State, and laugh at all its efforts to enforce the remedies given to it by the statute. But it is of no legal consequence that the defendant should have the particulars granted by the order. The complaint alleges in clear and plain terms that all the claims upon which the defendant and his confederates obtained the money were wholly false and fraudulent. There is no allegation or concession that any part of them was lawful or just. Upon such allegations there is no ground for a demand that the plaintiff shall state what parts of such claims were just and legal, or for

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items and services actually furnished or performed. It is not the 22
 office of a bill of particulars to enable the defendant to impeach
 or defend the claims asserted by plaintiffs' complaint (*Drake v.*
Thayer, 5 Robt., 694; *Fullerton v. Gaylord*, 7 *id.*, 551), but to
 ascertain what claims are asserted and demanded. So, where one
 sues on an account for moneys loaned, the defendant cannot
 demand a statement of what sums have been repaid (*Ryckman*
v. Haight, 15 Johns., 202), or what portions of the loans were
 usurious, or what credits ought to be allowed for any reason
 against the loans (*Williams v. Shaw*, 4 Abb. Pr., 209). If the 23
 demand be for \$10,000 of moneys lent, the defendant may
 demand the items that make up that sum, with dates and amounts
 of the respective sums, and the plaintiff will be required to
 specify such dates and amounts of loans. But if he avers that
 \$10,000 is due and unpaid, he cannot be compelled by bill of
 particulars to contradict that averment by showing that the
 amount actually loaned is not due because some portion has been
 paid, or some credit or counterclaim exists against it.

DANIELS, J., concurred, and BRADY, J., delivered an opinion 24
 to the same effect.

On settlement of the order, the General Term adhered to the
 reversal of the clause extending time to answer or demur; and,
 while denying the motion so far as it granted defendant relief,
 and affirming it so far as it refused him relief, they added a direc-
 tion that he have leave to answer within seven days.

On this point the court said: "The stipulation given by
 plaintiffs' attorney, after the hearing of the motion at Special
 Term, related in terms to that motion, and obviously was given
 to meet the contingency of a denial of the motion. That stipu- 25
 lation was superseded by an order adverse to plaintiffs, and which
 extended the defendant's time to 'answer, demur, or take any
 other action to which he might be entitled,' until twenty days
 after the service of an amended complaint and of the bill of par-
 ticulars. That order has been wholly reversed on this appeal.
 There was no stay of plaintiffs' proceedings by the order, and
 the strict legal result is that the defendant's time to answer or
 demur has expired."

Defendant appealed.

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- 26 *The Court of Appeals* dismissed the appeal.

MILLER, J. The questions arising upon this appeal are purely legal and must be disposed of according to strict legal rules.

As to that portion of the order in relation to a bill of particulars, it is sufficient to say that it was a matter purely discretionary, as was recently held by this court in the case of *Tilton v. Beecher*, 59 N. Y., 176. No question arises as to the burden of proof which presents an exception, which takes the case out of this general rule.

- 27 The refusal of the court to extend the time to demur upon the decision of the appeal from the order of the Special Term was also a matter of discretion, with the exercise of which this court should not interfere.

- The defendant could have demurred to the complaint in the first instance had he chosen to do so, and thus have presented the question as to whether the city was a proper party, as well as such others as could properly arise in that form. As he sought by motion to have the pleading made more specific he has no just ground for complaint that the court, in view of all the facts, 28 compelled him to answer. Nor does the stipulation of the plaintiffs' attorneys in any way affect the question, for it was superseded by the order of the Special Term which gave the defendant time to answer or demur, etc., until twenty days after the service of an amended complaint. When that order was reversed on appeal the court had full power to direct what terms should be imposed upon the defendant.

- The complaint does not contain a separate charge for neglect and another for a conspiracy. It purports to give a history of the acts connected with the conspiracy, and therein it appears, 29 by way of narrative, that the defendant and his associates were justly chargeable with negligence as well as fraud in the performance of their official duty. This clearly is not a separate and distinct claim for a neglect of duty upon which the action was based, but a statement of a fact auxiliary to and in aid of the general charge of conspiracy, by means of which the money was obtained. It may be regarded as a part of the alleged conspiracy and appropriately inserted in presenting its real character and as constituting a portion of the cause of action against the

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defendant. The question as to compelling an election, therefore, 30
between the charge of conspiracy and the charge of neglect,
does not arise. Even if it did, the right to compel an election
would also be a matter of discretion of the court to which the
application was addressed.

The learned counsel for the defendant insists that the different
acts of fraud referred to in the complaint and specifically stated
in the schedule, should be stated separately in conformity with
section 167 of the Code [of Procedure]. In this, I think, he
is entirely in error. This position is based upon the ground that
each of the items constitutes a separate, distinct and independent 31
transaction, and therefore each one of them forms of itself one
cause of action. I am at loss to see how such can be the case in
an action like the present any more than in a case where the
action is brought upon an account composed of different articles
furnished at different times and of various amounts. The
pleader here alleges, that by virtue of an act of the Legislature
it was enacted that all liabilities against the county of New York
should be audited by certain officers who were named, and be
paid to the parties entitled to receive the same upon the certificate 32
of said officers. That, with the intent to cheat and defraud, the
defendant Tweed and one Watson did unlawfully and fraudulently
combine, conspire and agree together to procure false and pre-
tended claims to be set up, allowed and paid in formal compli-
ance with the said act. That these pretended claims, falsely
alleged and purporting to be such liabilities of the county,
amounting to over \$6,000,000 as specified in the schedule annexed,
which was made a part of the complaint, were in apparent
formal compliance with the act, certified to have been audited
and allowed when they were not examined or audited; and 33
only one meeting of the board of auditors was ever held, at
which no accounts, claims or liabilities against the county were
presented or considered, or any proceeding had thereat, except
that a paper which is set forth was subscribed by said auditors.
That said Watson, or his assistants, acted upon said pretended
accounts or claims in the schedule and attached certificates
to the same, and that they were all false, fictitious and fraudu-
lent and did not represent any liabilities against the county

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34 which were directed to be audited, provided for or paid within the meaning of the act. Some other allegations are made not material to be stated. As the complaint alleges that all the items set forth in the schedule were fraudulent and certified in pursuance of a general conspiracy, a statement in detail of each one separately would be unnecessary, and there is no rule of law which requires such detailed particularity in stating a cause of action of this character. At common law, in ordinary actions of assumpsit, a general statement of an account comprehending
35 numerous causes of action is regarded as sufficient. There is less reason for requiring a more particular statement under the Code, which was designed to simplify pleadings, and would fail to accomplish its purpose if so great and tedious prolixity was demanded. Even although in an indictment under the strict rules applicable to criminal pleadings, separate counts are required for each item. This rule bears no analogy to a case where a cause of action arises embracing a large number of items. The auditing of each item of the entire claim did not constitute a single act of fraud of itself, which necessarily and for that reason
36 must be prosecuted as a separate cause of action, but is one of a series of acts in connection with a general conspiracy alleged, which forms a part of the entire action and the whole demand of the plaintiffs.

The case of *Forsyth v. Edminston* (11 How. Pr. R., 409), which is cited, bears no analogy to the case at bar, and presents entirely different aspects. The question now presented did not arise, and none of the cases referred to are in conflict with the views expressed. It should be entirely clear upon a motion to
37 the court to compel the plaintiff to make his complaint more definite and certain, that the pleading is insufficient, before the court should interfere, and unless such is plainly the case, the relief demanded should be refused. It is not apparent here that there was any defect in this respect, and as such applications are addressed very much to the discretion of the court, the decision of the General Term is final, and no appeal lies therefrom, to this court. (*Matter of Duff*, 10 Abb. [N. S.], 416.)

It was not necessary that the interest of the city should be stated specifically, and it was quite enough to set forth that it had some right or interest in the premises.

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From the observations made, and independent of any other ³⁸ considerations, it is evident that the decision of the General Term was made upon all the points presented in the exercise of a legal discretion existing in that court, and no legal right having been violated, it is not the subject of review in this court. (See *Howell v. Mills*, 53 N. Y., 335; *Livermore v. Bainbridge*, 56 *id.*, 72; *Tabor v. Gardner*, 41 *id.*, 232.)

The appeal should, therefore, be dismissed, with costs.

All concurred; ALLEN and EARL, JJ., in result.

Appeal dismissed.

DWIGHT v. GERMANIA LIFE INS. CO.

New York Court of Appeals, 1881.

[Reported in 84 N. Y., 493; aff'g in effect 22 Hun, 167.]

1. The court has inherent power to order either party to furnish a bill of particulars when justice demands that the adverse party should be apprised of the matter upon which he is to go to trial with more particularity than is required by the rules of pleading.
2. An order for particulars may contain a provision that the party be precluded from giving evidence on the trial of matter called for by the bill of particulars and not specified in the bill.
3. An affidavit to obtain a bill of particulars is not necessarily insufficient merely because it shows that the applicant knows some of the particulars.
4. In an action on a life policy, where the insurer pleads that the deceased had bronchitis and spitting of blood, it is not improper to order particulars of the times and places at which he had them, nor to order the particulars of other applications for insurance, the making of which has been pleaded by defendant as a breach of the warranty given by the deceased.

Action on a policy of life insurance.

1

The *complaint*, after alleging the defendant's incorporation, continued as follows :

" That on or about the 28th day of August, 1878, the defendant, in consideration of the payment to it by Walton Dwight, of

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- 2 Windsor, Broome county, N. Y., on the delivery of said policy, of the sum of one hundred and thirty-one dollars and fifty-five cents, and of the quarterly payment to be made of a like amount on or before noon of the 26th day of November, February, May and August in every year during the continuance of the policy, assured the life of said Walton Dwight in the sum of fifteen thousand dollars, for the term of his natural life, by its policy, number 69,096, bearing date August 28th, 1878, a copy of which policy is hereto annexed as a part of this complaint and marked
- 3 'Exhibit A,' and therein promised and agreed to pay at its office in the city of New York, within sixty days after due notice and proof of the death of said Walton Dwight, the said sum assured (the balance of the year's premium, if any, being first deducted therefrom), to the executors, administrators or assigns of the said assured.

"That on or about the 15th day of November, 1878, said Walton Dwight died at Binghamton, N. Y., leaving a last will and testament, in and by which the plaintiffs were duly appointed executrix and executors thereof.

- 4 "That thereupon and thereafter there was no officer qualified to act as surrogate in the matter or proceedings of the probate of said last will and testament in the surrogate's court of said county of Broome, and that the surrogate of said county thereupon duly made a certificate of such disqualification, specifying the grounds thereof, and the name of Charles A. Clark, surrogate of the adjoining county of Tioga, and filed the same in his office; and that other and all necessary proceedings were duly had; so that jurisdiction became vested in said Charles A. Clark, surrogate; and that on or about the 30th day of December, 1878, said
- 5 last will and testament was duly proved and duly admitted to probate by said Charles A. Clark, surrogate, and letters testamentary thereon duly issued and granted to the plaintiffs as such executrix and executors by said Charles A. Clark, surrogate; and the plaintiffs thereupon duly qualified as such executrix and executors, and entered upon the discharge of the duties of such office, and still are the duly appointed and constituted executrix and executors of the last will and testament of said Walton Dwight.

"That on or about the 20th day of January, 1879, and more than sixty days prior hereto, the plaintiffs, as such executrix and executors, duly gave the defendant due notice and proof of the death of said Walton Dwight. 6

"That said Walton Dwight duly conformed and complied with all the provisions and agreements contained in said policy, to be kept and performed by him; and that the representations contained in the application for said policy were in all respects true; and that said policy was valid and in full force and effect at the time of the death of said Walton Dwight; and that such death was not caused by any of the causes excepted in said policy, and that said Walton Dwight has not done any of the acts stated in said policy as rendering the same void; and that said policy has not ceased and become null, void and of no effect by reason of any act, thing or omission on the part of said Walton Dwight or otherwise; and that the plaintiffs, as such executrix and executors, have made due and sufficient demand, and have duly done and performed all things requisite to be done and performed upon their part. 7

"That the defendant has duly refused to pay said sum or any part thereof, and that no part of the said sum assured has been paid, and that there is now due and owing to the plaintiffs from the defendant the sum of fifteen thousand dollars, with interest thereon from February 22d, 1879, less the three quarterly payments of \$131.55 each. 8

"WHEREFORE," etc.

[*A copy of the policy was annexed.*]

The answer, among other things, contained the following :

"The said defendants . . . deny that the said Walton Dwight duly performed or complied with all the provisions and agreements contained in said policy, to be kept and performed by him; and they, upon information and belief, deny that the representations contained in the application for said policy were, in all respects, true; and they particularly deny that the representations contained in the application for said policy, touching the previous condition of health of the said Dwight, and especially in regard to his ever having had spitting of blood or bronchitis, and the representations respecting other insurances 9

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- 10 upon the life of the said Walton Dwight, or any or either of them, were or are true."

In a second defence the answer stated, among other things, that upon the application for the policy certain questions were put to said Walton Dwight, and answers made by him, among which were the following:

"16. Has the party [meaning the said Walton Dwight] now, or has the same ever had, any of the following diseases: spitting of blood, bronchitis" [*naming others also*].

- 11 "And in answer to said question said Walton Dwight denied that he had ever had any of the said diseases specified, except rheumatism."

[*Among other questions and answers the following also were pleaded:*]

"6. C. Whether an insurance has been applied for with this or any other company, without having led to an insurance? If so, with which companies? And for what reason did the application not lead to an insurance? And that to said question the said Dwight answered 'No.'

- 12 [*Here followed allegations to the effect that it was agreed that the answers to the application should be the basis of the policy, and untruth in them should avoid it, and that each answer was material to the risk. It was then alleged:*] "That each and every of the said answers and statements contained in said application, and hereinbefore specified, was false and untrue in the following respects" . . . [*among others*] . . . "That prior to the application for the said policy, the said Walton Dwight had had bronchitis and spitting of blood; . . . and that at the time when said application was made, the said
- 13 Dwight had other insurances upon his life in addition to those specified by him, which fact he suppressed, and had made applications for insurance to one or more companies to this defendant unknown, which had [not] led to an insurance."

The plaintiffs, on affidavit to the condition of the cause, and their lack of knowledge or information as to the times and places at which defendants claimed that Dwight had bronchitis and spitting of blood; and as to what insurances or applications

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for insurance, in addition to those specified, defendant claimed 14
there had been, etc., moved for a bill of particulars on those
points.

Defendants opposed the motion on an affidavit of their
counsel that he was still engaged in collecting evidence, and
their evidence as to the diseases, so far as they yet knew,
consisted of declarations and admissions of Dwight, made in
general language, not specifying precise times and places. And
that as to the allegations respecting other insurance also, they
were still pursuing their investigations; and the allegations 15
were as full and specific as they could reasonably be made under
the circumstances and sufficient to prevent surprise on plaintiffs
at the trial.

The Supreme Court at Special Term granted the motion by
making an order in these terms: "That the defendant deliver
to the plaintiffs' attorney, within twenty days from the entry of
this order and notice thereof, a statement in writing, under oath,
stating the particular times and places at which the defendant
intends or expects to prove that said Walton Dwight had 16
bronchitis and spitting of blood, or either of them; also stating
what other insurances upon his life, in addition to those specified
by him in his application, the defendant intends or expects to
prove that said Walton Dwight, had at the time when said
application was made, specifying particularly the name of each
company, with the date and amount of each policy; also stating
what applications for insurance to one or more companies
which had not led to an assurance, the defendant intends or
expects to prove that said Walton Dwight had made at the time
when said application for the policy upon which this action is 17
brought was made, specifying particularly the name of each
company to which application had been so made, with the time
when made, and the date of each application.

"And it is further ordered, that the defendant be precluded
from giving evidence upon the trial that said Walton Dwight
had had bronchitis and spitting of blood, or either of them, at
any time or place; and that said Walton Dwight had any
insurances upon his life at the time when said application was

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26 day, affidavits, showing an alibi and surprise, were held to make good ground for a new trial. (*Sargent v. —*, 5 Cow., 106.) Now, would the plaintiff there have been in a worse plight if before the trial the court had ordered him to give a bill of the particular occasions on which he expected to prove copulation? The same end was reached by granting a new trial as could have been by ordering the particulars. And the same rule would apply in the case of a plaintiff seeking a new trial against a defendant, for surprise by the testimony of the latter. But it is said that, though the power may once have been in the courts, by
27 reason of recent statutory provisions, it is not there now. The 531st section of the new Code touches this subject. It is claimed that by it the power is taken away, if the courts ever had it. That section provides that the court may, in any case, direct a bill of particulars of the claim of either party to be delivered to the adverse party. If it should be conceded that there is no power left in the court other than that which this section gives, still we do not assent to the claim made. The strength of the defendants' position is, in the definition they give to the word "claim,"
28 found in this section. It is contended that the word is synonymous with "demand," and "cause of action," and that it was intended to express by it only the ground, or cause of action, on which some affirmative relief is asked of the court, and in cases only in which affirmative relief is asked.

We do not think it so restricted in purpose as that. In our view the claim spoken of by that section, where the case of a defendant is in hand, is whatever is set up by him as a reason why the action may not be maintained against him. The claim of the defendant is that ground of fact which he alleges in his
29 answer as the reason why judgment should not go against him. His claim, in the case, is the position he takes in his pleading, based upon the facts he sets up, and the law applied thereto, why he should go without day. We have used the word, in some of its forms, twice in this paragraph, as expressive of a meaning as broad as that, and no doubt have been understood. There is no reason for saying that the intention of the Legislature was to use the word with a narrower meaning. When § 531 was passed, the draughtsmen of the new Code had before them the case of *Tilton*

v. Beecher (*supra*), and the cases cited in it. That case had 30
 been decided under the old Code, and with § 158 of that Code
 in mind. That section does not differ, in substance, from § 531
 of the new Code. The framers of § 531 knew the power that
 the courts had to order bills of particulars, as shown by the
 opinion and judgment in that case. If it was meant by them to
 take away or narrow that power, there would have been some
 expression of an intention so to do. We find no indication,
 either in the section itself, or in any annotation on the section,
 that there was such purpose. The general purpose of the Code
 was, or should have been, to embody, in apt words, a declaration 31
 of the law as it was. If the purpose of any section was more
 than that, and was to change the law as it was, and to take away
 judicial power then possessed, we should find some hint of it
 in the section, or in reports accompanying it, or in annotation
 upon it. Besides, § 4 does continue, in the courts, the exercise
 of the jurisdiction and powers then vested in them by law,
 according to the course and practice of the courts, except as
 otherwise prescribed. Section 531 is not, in terms, prohibitory
 of the power, and may not be said to prescribe otherwise. Nor 32
 is there warrant for the contention, that the Code withholds
 power, unless the defendant seeks affirmative relief. That would
 be to make the power depend upon an incident merely. Sup-
 pose that the defendant, in any case, should, in his answer, ask
 judgment for a perpetual injunction on the same facts which he
 set up as a defence. This would be invoking affirmative relief.
 That alone would not bring the case within § 531, and give
 power to the courts. The existence of the power is not got from
 the prayer of the answer, but is inherent in the court, or recog-
 nized and preserved by the Code, or both. It would not keep in 33
 view the real purpose of ordering particulars, and the real
 purpose of the existence and exercise of the power, to hold that
 in such case particulars could be ordered, while, if the defendant
 waived or struck out his prayer for an injunction, it could not.

That purpose, as we have seen, is to reach justice between the
 parties by evolving the truth from their discordant statements,
 and to give the parties every reasonable facility for coming to
 the trial, fully prepared for all that may be produced by the

Dwight v. Germania Life Ins. Co., 84 N. Y., 493.

34 other side. This is just as important, whether the matter is set up as a bare defence, or as a basis for a demand for affirmative relief.

35 The orders in these cases provide that the defendants be precluded from giving evidence on the trial, of matter not specified in the bill of particulars furnished. It is urged that the Special Term had no power to affix this penalty to a failure or an inability to furnish a complete bill. The contention is based upon the reading of the 531st section. The first clause of that provides that on demand a copy of the account pleaded must be furnished. The second clause provides that a failure to do so will preclude from giving evidence of the account. The third clause provides for an order by the court to furnish a further account when the first one is defective. The fourth clause is the one we have already stated, that the court may, in any case, direct a bill of the particulars of the claim of either party to be delivered. Now because the section does not anywhere but in the second clause speak of a penalty on non-delivery of a bill of particulars, it is argued that the Code meant that the courts
36 should have no power to affix one. Clearly, the courts have power, by the Code, to grant an order for a further account, and for a bill of the particulars of the claim of either party. If the Code keeps from the court the power to affix a penalty to failure to obey its order, it is only by not repeating the clause giving the penalty. That would be to give more force to a demand of a party for an account, than to the order of the court for a further account. This would be absurd. There should follow the same penalty for not furnishing a further account when ordered, as there does for not giving a first account when
37 demanded. There is power in the court to order that it shall follow. And if there is that power in making an order for a further account under the third clause, there is the same power in making an order for the particulars of a claim under the fourth clause.

The Code did not mean to take away the power, which courts always have had, of affixing a disability to disobedience of such orders. It was needed that it should enact the penalty for failure to comply with a demand of a party, but it was not

needed that it should in terms give a power that the courts had 38
always possessed. Besides, the bill of particulars is in aid of
the pleading; it is sometimes called an amplification of the
pleading. The particulars are considered as incorporated with
the pleading (*Fleuret v. Durand*, 14 Johns., 329; *Van Vechten*
v. Hopkins, 5 *id.*, 211), and on production of the order, and
proof of the delivery of the bill, the parties are not allowed to
give evidence out of it. (*Holland v. Hopkins*, 2 B. & P., 243;
Hurst v. Watkis, 1 Camp., 69.) It is an exercise of the same
power, to preclude in the order proof of matter not specified in 39
the bill of particulars. It matters not whether the power is
exerted by a declaration in the order, or by a ruling from the
bench on the trial.

There are arguments *ab inconvenienti* made against the
existence of the power. These are drawn from the alleged
difficulty of preparing a complete bill of particulars in the short
time allowed a defendant to answer, and thereafter to comply
with an order; and from the difficulty of making an exact and
comprehensive bill of particulars before full and precise
preparation for trial and for proof of the defence has been made. 40
These difficulties must attend in greater or less degree any case
in which a defendant can be ordered by the court to furnish a
bill. As it is shown that there are cases in which the court has
power to make an order upon the defendant to give particulars,
it follows that these are not legitimate arguments against the
existence of power to order, but rather for the favor of the
court as to the terms and conditions of the order.

It is also urged that the allegations of the plaintiffs' affidavits
are not sufficient to set the courts in motion. We think the papers 41
before the Special Term were enough to authorize the courts
below to entertain the motions. It is said that the plaintiffs
state no more in those affidavits than that they do not know
to what instances the averment of the defendants' pleadings
refer, while they do not state that they do not know of some
instances of the same kind with those averred. But grant that
the plaintiffs know of instances; they may be fully prepared
to show that they are innocuous to their right of action. The
instances which they know of may or may not be the same

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- 42 of which the defendant has knowledge or information ; hence it is for the court to say in its discretion whether they should be informed. Therefore, the affidavits, in averring an ignorance of the one class, while not averring an ignorance of any other, do make a case for the discretion of the court. (See *Snelling v. Chennells*, 5 Dowl., 80 ; s. c., 12 Leg. Obs., 75.) The position of the defendant is, that as it may be assumed that the plaintiffs have knowledge of some instances, it may be further assumed that they must be the same of which the defendant has information ; or, upon another assumption, that the instances do,
- 43 in fact, exist, and that, therefore, the plaintiff cannot be ignorant of them. It is plain that the first assumption is not of necessity correct. The second is to assume the truth of the very issue to be tried, as it is raised by the verified pleadings of the parties, which were parts of the moving papers. We conclude, then, that the courts below had power to make orders that the defendants furnish statements of the particulars, and that the granting of them rested in the discretion of those courts.
- 44 *Second.*—It remains, then, to inquire whether that discretion has been abused. Taking the cases and the orders in their general aspect, it cannot be said that it has. The defences set up and the manner of pleading them are such, that manifestly the plaintiffs would go down to trial at some hazard of being taken by surprise, if there were not given to them some more specific statements than the answers open, of the time and place and other circumstances of the occurrences alleged in most general terms. It was a discreet exercise of power to order that more specific statements be given.
- 45 But objections are made to the terms and conditions of these orders, as directing either impossibilities, or acts that will be highly detrimental to the defence of the defendants. The orders direct that the bill state the particular times and places at which the deceased had bronchitis and spitting of blood. If this was to be so construed as requiring a statement of the very day or days, and the very houses of abode or buildings of business, on and at which he had the disease or raised the blood, there would be force in the complaint that it is impossible. It

is not to be so construed. The times, in a true construction of 46
the order, are the spaces of time, and the places are the municipal
localities. Surely if the defendants have been informed so as to
aver, and verify the averment, that Dwight had bronchitis and
spit blood, they must have information specific enough to com-
ply with such a requirement. Nor would a statement thereof
imperil a defence beyond a peril to which it should be exposed,
that of having the testimony to sustain it met by countervailing
testimony covering the same space of time and as to the same
localities. It surely is not more hazardous than to have met the 47
new trial granted on the ground of surprise in 5 Cow. (*supra*).
To state the other insurances upon the life of Dwight, or the
other applications for insurance, is easy if they are known or
information has been had of them; and we see no likelihood of
unreasonable hazard to the defence by doing it. Nor do we see
that the order calls for a disclosure of the evidence on which the
defendants rely to support their defence. A statement would
not disclose whether the evidence would be oral or written, nor
who would give the oral testimony, nor the nature or source of that
in writing. And these remarks apply *mutatis mutandis* to the 48
other matters contained in the various orders. And it is always
to be borne in mind, that these orders are to be read and used,
and action under them is to be had, in accordance with settled
rules of practice, which are safeguards to parties on either side.
In the words of LORD MANSFIELD: "The bill of particulars must
not be made the instrument of injustice, which it is intended to
prevent." (Millwood v. Walter, 2 Taunt., 224. See, also,
Hurst v. Watkis, 1 Camp., 69, note; Lovelock v. Cheveley, 1
Holt's N. P., 552.)

We are not required to say, and we do not say, that in the 49
exercise of discretion we would have granted orders as minute
in some points as are the orders in these cases. If they are
likely to be oppressive upon the defendants, application for
relief will doubtless be considerably met by the Special Term.
The purpose of the court below is to secure a fair and well
advised trial of an important and substantial controversy, after
due preparation for what will be shown on either side; and the

Butler v. Mann, 9 Abb. N. C., 49.

50 ear of the court will be open to any reasons that will convince it that further action is called for to that end.

These considerations bring us to the conclusion that the appeals in these cases should be dismissed.

All the judges concurred except FINCH, J., taking no part, and RAPALLO, J., absent.

Appeal dismissed.

BUTLER v. MANN.

New York Supreme Court, Special Term, 1880.

[Reported in 9 Abb. N. C., 49.]

1. The provisions of the Code of Civil Procedure, allowing the court to direct a bill of particulars of the claim of either party, confers a broad judicial discretion, and are declaratory of the practice which existed prior to the Code.*
 2. The power thus conferred should be prudently employed, with the view to enable parties to prepare their pleadings and evidence for the trial of the real issues involved, but not to impose unnecessary labor on any party.
 3. Where sureties, sued on an official bond, applied for particulars of the moneys received by the principal, and for which it was alleged he had failed to account,—*Held*, that in absence of anything to indicate that defendants could not, equally with plaintiff, ascertain the facts from the principal, the application should be denied.
 4. The object of this provision is to enable a party reasonably to protect himself against surprise, not to impede the prosecution of an action, nor unnecessarily increase its expense.
- 1 Motion for bill of particulars.

Samuel Butler, as supervisor of the town of Richmondville, sued Tobias Mann and others on an official bond. Defendants now moved to compel the plaintiff to furnish a bill of particulars.

INGALLS, J. Section 531 of the Code of Civil Procedure provides: "The court may in any case direct a bill of particulars of

*For other cases on the right to a bill of particulars, see *Wigand v. DeJonge*, 18 Hun, 405; *Stillwell v. Hernandez*, 7 Daly, 485; *Stiebelung v. Lockhaus*, 21 Hun, 457; *Clark v. St. James Ch.*, *id.*, 95.

For the mode of obtaining the bill, see *Clegg v. American Newspaper Union*, 7 Abb. N. C., 59.

Butler v. Mann, 9 Abb. N. C., 49.

the claim of either party to be delivered to the adverse party." 2
This provision confers upon the court a broad judicial discretion, and is declaratory of a practice which existed anterior to the adoption of the Code, but which was very sparingly exercised in this State. (*Tilton v. Beecher*, 59 N. Y., 176.) The power thus conferred should be prudently employed, with the view to enable parties to prepare their pleadings and evidence for the trial of the real issues involved in an action, and not to impose unnecessary labor upon any party. This statute, if judiciously enforced, will be of great value; otherwise, it will prove mischievous and oppressive. 3

An examination of the facts, disclosed by the papers, has convinced us that the defendants can, without risk or embarrassment, answer the complaint in some of the forms of pleading provided by section 500 of the Code. So far as preparing for the trial of the action is concerned, we do not discover that the plaintiff possesses facilities for ascertaining the facts desired by the defendants, superior to those which are possessed by the latter. It is not shown that any hostility exists between the principal to the bond and his sureties, and we should not infer that information is withheld by him from the defendants, in regard to the moneys received and disbursed by him, which constitute substantially the subject-matter of this action, and it would, therefore, seem that the defendants possess advantages for ascertaining the facts which they seek superior to those within the reach of the plaintiff. The action is upon a bond, and the breach assigned is in effect the failure of the principal thereto to account for the moneys which he has received belonging to the plaintiff. It is but reasonable to assume that the receipt and disbursement of the money by the principal to the bond, as alleged in the complaint are within the knowledge of such principal, and that the defendants, the sureties, can procure from him information in regard thereto, more reliable and accurate than any statement which the plaintiff can furnish. In such case the defendants should not be allowed to impose upon the plaintiff the labor of furnishing particulars which are equally within the reach of the defendants (*Powers v. Hughes*, 7 J. & S., 482; *Wiegand v. De Jonge*, 18 Hun, 405; *Youngs v. De Mott*, 1 Barb., 30). It 4 5

Melvin v. Wood, 3 Abb. Ct. of App. Dec., 272.

- 6 was suggested upon the argument that, the plaintiff having brought the action, it should be assumed that he is in possession of the facts which constitute the cause of action. The plaintiff has set out in the complaint, the bond, and alleged wherein the condition thereof has been violated by the principal thereto, and the extent of his default so far as the knowledge and information of the plaintiff extends. This statute should not be construed and enforced in such manner as to create unnecessary perplexity and embarrassment, or prove a snare in the prosecution of actions. It was obviously intended by this provision of the
- 7 Code to enable a party reasonably to protect himself against surprise, but not to place impediments in the way of the prosecution of an action, or to unnecessarily increase the expense of litigation. Without stopping to discuss the various decisions which have been made upon this subject, and bearing in mind that every case must be determined in accordance with the circumstances of the particular case, we conclude that the defendants in this action have failed to establish a state of facts entitling them to the bill of particulars which they seek, and that the
- 8 motion must be denied, with costs.
- +

MELVIN v. WOOD.

New York Court of Appeals, 1867.

[Reported in 3 Abb. Ct. of App. Dec., 272.]

1. A bill of particulars annexed to the complaint forms part of it, and is amendable accordingly.
 2. A referee has power, on the trial of the issues, to allow a new bill of particulars to be substituted for that annexed to the complaint.
- 1 Action to recover a balance of account. The account included charges for goods sold and moneys advanced by plaintiffs to defendants, and credits for proceeds of sales on commission, damages for injured goods, interest, etc.

The plaintiffs annexed to the complaint a bill of particulars or copy of the account. The referee allowed them to amend this upon the trial, by substituting a new bill of particulars.

Judgment was given for plaintiffs, and defendants appealed.

By THE COURT.—DAVIES, Ch. J. Upon the facts found by the learned referee, the judgment in favor of the plaintiffs for the amount thereof was clearly correct, and must stand, if no errors were committed upon the trial. This I understand to be conceded by the learned counsel for the appellants, and he therefore proceeds in his brief to point out the several erroneous rulings which, in his opinion, he thinks the referee made upon the trial. [After disposing of an unimportant exception to evidence, the learned judge proceeded as follows:]

2. It is objected that the referee erred in allowing the plaintiffs to amend their bill of particulars. To the complaint was annexed, and served therewith, an account of the defendants with the plaintiffs, appropriately designated as a bill of particulars. It formed a part of the pleadings in the action. Upon the trial, the counsel for the defendant Wood, moved for leave to amend his answer, so as to conform the second and third heads of the defence, and particularly the counterclaims, to the testimony already given, and particularly to the testimony of Samuel Barker. The referee decided to allow the amendments to the answer of the defendant Wood, as proposed by his counsel, and thereupon the same was amended accordingly. The plaintiffs' counsel then moved for leave to amend the complaint by substituting, in the place of the original bill of particulars, a new bill of items filed with the referee, to which the counsel for the defendant Wood, objected; and the referee overruled the objection, and allowed the amendment to the complaint; and to this decision the counsel for the defendant Wood, then and there excepted.

Sections 169 and 173 of the Code [of Procedure] fully authorized the referee to amend the pleadings of the respective parties in this action, and we do not regard his rulings in this respect open to review in this court. It was a matter resting in the discretion of the referee, and we think it was properly exercised in the present instance. We think it hardly lies with the defendant to object that the same favor was allowed to the plaintiff which he asked for and was accorded to himself, particularly as the very amendments to his pleadings, which he made by leave of the referee,

Hoff v. Pentz, 1 Abb. N. C., 288.

- 6 probably necessitated and called for amendments on the part of plaintiffs. The privilege which was conceded to one party was properly granted to the other, and we see no error in the referee's rulings on this branch of the case.

[The remainder of the opinion related to a question of evidence, and to unimportant exceptions.]

All the judges concurred.

Judgment affirmed, with costs.

HOFF v. PENTZ.

New York Supreme Court, First Dep., Chambers, 1876.

[Reported in 1 Abb. N. C., 288.]

1. Under Code Pro., § 158 [substantially re-enacted in Code Civ. Pro., § 531,] the court cannot require service of a further and more particular account because a copy of an *account stated*, which has been alleged in the pleading and has been served on demand, is unsatisfactory.
 2. An account stated cannot be altered.
 3. In an action by a trustee appointed to succeed a deceased trustee, for moneys received by defendant for the benefit of the trust estate, defendant alleged an account stated with the deceased trustee. *Held*, that, in order to obtain details of the items composing such account stated, an examination of the defendant before trial was proper.
- 1 Plaintiff sued as substituted trustee to recover for moneys received by defendant for the benefit of the trust estate.
- Defendant among other defences, alleged an account stated with the deceased trustee Barker, and upon demand therefor served a copy of such account.
- Plaintiff claimed that the account was indefinite and defective, and moved for an order requiring a better account to be served.
- 2 LAWRENCE, J. One of the defences in this case set up in the defendant's answer is an account stated. A copy of the alleged account stated, purporting to be dated January 1, 1870, has been served upon the plaintiff's attorney, who now moves for a further and better account of an item in said account contained.

Goings v. Patten, 17 Abb. Pr. Rep., 839.

If it be true that the account served is an account stated between 3
Barker and the defendant, the defendant cannot, so far as I am
able to see, serve a further account with Barker; it cannot be
altered. The effect of the account is something to be deter-
mined on the trial. If the account is false and fraudulent, that
fact can be shown on the trial, and its force avoided. I do not
consider the plaintiff as entitled to relief under section 158 of the
Code [Code Civ. Pro., 531.] But this is a case in which it is
clear that an examination of the defendant before trial may con-
tribute materially to aid the plaintiff; and as further relief is
asked for, I am inclined to entertain an application for such
examination.

GOINGS v. PATTEN.

New York Common Pleas, General Term, July, 1863.

[Reported in 17 Abb. Pr. Rep., 839.]

1. *It seems* that a defendant relying on an account stated, if he fails to
prove that it was mutually adjusted, and the balance ascertained,
may fall back upon the accounts and prove that there is, in fact, a
balance due him, unless his pleading is so framed as to show that he
relies solely on the account stated.
2. A pleader, claiming on an account stated, who refuses to furnish the
items of his demand, pursuant to the section 158 of the Code of Pro-
cedure [Code Civ. Pro., § 531,] should be precluded from giving evi-
dence of such items further than may be necessary to prove the set-
tlement of the sum due.

Appeal from an order precluding defendants from giving 1
evidence of the items of an account.

The answer set up certain payments, and a counterclaim upon
an account, the items of which were not given; the plaintiffs
demanded a bill of particulars, which was refused, whereupon
the following order was made: "That the defendants, on the
trial of this action, be and they are hereby precluded from giv-
ing any evidence of the account and the items thereof, stated
and mentioned in the answer of the defendants served in this
action, except only so far as may be necessary to establish the
single defence of account stated and settled between the parties,

Goings v. Patten, 17 Abb. Pr. Rep., 339.

- 2 it being alleged on this motion that that is the only defence sought to be interposed in this action, and set up by the defendants' answer." From this order the defendants appealed.

DALY, F. J. The appellant insists that the judge should have decided whether this was or was not an averment of an account under the 158th section of the Code; that if it were not, the plaintiff's motion should have been denied; and that if it were, the defendants should have been allowed time to furnish items upon terms. I do not see that this necessarily follows. A party
3 may fail to establish the stating of an account, but that does not cut him off from any defence he may have upon the unsettled account. The two defences are not inconsistent. "The statement of an account," says an old case (*Drue v. Thorne, Alleyn*), "doth not alter the nature of the debt; it only reduceth it to a certainty." It admits the existence of a prior running account; and because the party relies upon the defence, that it was mutually adjusted, and the balance ascertained and fixed, and fails to prove it, he is not thereby precluded from falling back
4 upon the accounts, and showing that there is, in fact, a claim or balance due to him. He would undoubtedly be precluded from doing so if his pleading were so framed as to show that he relied solely upon the defence of an account stated, for, that being made the sole issue, the other party might come unprepared to try any other. But a party might always join with an account stated an account for the original debt; and if he failed upon the one, he might recover upon the other. (1 Saund. on Pl. and Ev., 42.) In the present case the judge appears to have regarded
5 the defendants' answer as entitling them to prove an account stated, which raises an implied promise to pay the sum found, upon the mutual adjustment, to be due; or, failing in that, to show the existence of a mutual account, and an indebtedness to them arising under it. It would have been entirely consistent with the defence of an account stated for the defendants to have furnished a copy of the account upon which they meant to rely in the event of their failing to prove the stating of an account. They elected not to do so, and so cut themselves off from the right of giving any evidence to that effect, and limited them-

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selves upon the trial to the proof of an account stated. The 6
defendants have failed to deliver a copy of the account within
the time which the Code allows after demand made, the plaintiff
was entitled to an order precluding them from giving evidence
of it.

[*After passing upon another point, which is here omitted, the
judge concluded:*] The clause in the order that it should not be
construed as precluding them from establishing the defence of
an account stated was unobjectionable. It prevented the possi-
bility of any misconstruction upon the trial as to the meaning of
the order. As the defendants had precluded themselves from 7
setting up any other defence, they could in no way be affected
injuriously by it.

The order at Special Term should be affirmed.

HILTON and BRADY, JJ., concurred.

GEBHARD v. PARKER.

N. Y. Court of Appeals, 2nd Div., 1890.

[Reported in 120 N. Y., 33.]

1. Under Code Civ. Pro., § 531,—providing that the party alleging an
account in his pleading must deliver to the adverse party, within ten
days after a written demand thereof, a copy of the account, and “if
he fails so to do, he is precluded from giving evidence of the account,”
—the better practice is to obtain before trial an order precluding the
party neglecting to serve the bill of items from giving evidence
thereof.*

Action for goods sold.

The plaintiffs alleged that the defendants, at the time in 1
question, were co-partners, doing business in the partnership
name of “Daily Hotel Gazette Publishing Company” and of
the “Daily Standard,” and that between July 2, 1885, and
August 31, 1885, the plaintiffs sold and delivered to the

* Where, in any other action, the Court has ordered a bill of the particulars of the claim or
defence of either party to be served, it may, for disobedience to its order, strike out the party's
pleading on motion, or stay his proceedings. *Gross v. Clark*, 87 N. Y., 272; 2 Abb. Pr. & F.
408.

Gebhard v. Parker, 120 N. Y., 33.

2 defendants as such co-partners, at their request, certain goods at
an agreed price mentioned, which remained unpaid.

The defendant Parker denied the alleged co-partnership, and
alleged that the partnership of the defendants was dissolved on
July 1, 1885, of which the plaintiffs had notice, and that for the
goods mentioned in the complaint credit was given to the
defendant Frecknall alone, and that the defendants as co-
partners never had any dealings with the plaintiffs. The other
defendants did not answer. The defendant Parker made
3 written demand of "a bill of items of matters set forth in the
complaint . . . as the foundation of the plaintiffs' claim
against the defendants." No bill of items was served.

On the trial the defendant objected to evidence offered to
prove the sale and delivery of the goods referred to in the
complaint, on the ground that the plaintiffs had failed to comply
with such demand; the objection was overruled and exception
taken, and evidence of the sale and delivery was introduced.
The only controverted question upon the trial was whether the
defendants were partners at the time of such sale, and whether
4 the plaintiffs had any notice of a previous dissolution of the
firm.

At Trial Term, plaintiffs had a verdict.

The General Term of the Superior Court of Buffalo, affirmed
the judgment.

The Court of Appeals affirmed the judgment.

BRADLEY, J. [*After stating the facts.*]

5 Inasmuch as the alleged sale and delivery of the goods was
not controverted by the answer, and no proof of that fact
requisite, it is not apparent that the bill of items demanded
could have had any essential importance or have furnished any
legitimate aid to the defendant upon the issue presented by the
pleadings for trial. The only fact which the plaintiffs were,
upon this issue, required to establish, was that the defendants, as
partners, were liable to pay for the property alleged to have
been sold to them, and that was dependent upon the fact, either
that they were such partners at the time of the sale, or that the

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plaintiffs had the right to so treat the defendants for the purpose
of charging them with liability for the goods. It is assumed by
the counsel for the parties that the verdict of the jury had the
support of evidence. But assuming as urged by the defendant's
counsel, that the exception founded upon the failure of the
plaintiffs to furnish a bill of items in compliance with demand,
presents the question of practice in that respect for consideration,
the inquiry arises whether it was error to permit the introduc-
tion of the evidence of the sale and delivery of the goods.

The statute provides that the party alleging an account in his
pleading must deliver to the adverse party, within ten days
after a written demand thereof, a copy of the account, and "if
he fail so to do he is precluded from giving evidence of the
account." (Code § 531). The provisions of the old Code
provided that a party of whom such demand was made should,
within the same time, deliver to the adverse party a copy of
the account, "or be precluded from giving evidence thereof."
(§ 158). Prior to the Code the preclusion of evidence of an
alleged account of which a bill of particulars had been demanded
was dependent upon an order to that effect, and such was the
practice pursued under the old Code. (*Kellogg v. Paine*, 8
How. Pr., 329; *W. & P. R. R. Co. v. Meyers*, 16 Abb. Pr. Rep.
(N. S.), 34; *Moore v. Belloni*, 10 J. & S., 184). The difference
between the language of those provisions of the two Codes is
verbal rather than substantial, and there is no less reason for the
continuance of the rule of practice under the latter than existed
when the provisions of the earlier statute were in force.
Neither provided for an order except in the event that the
account delivered should be defective, in which case provision
was made in both statutes that the court or a judge was
authorized by order to direct the delivery of a further account.
It seems that the demand is effectual to give the party a right
to a copy of the account so called for, and that the penalty for
failure to comply with it is the preclusion of evidence of the
account on the trial. Thus far the statute is plain. But the
manner of executing this provision of the statute is a matter of
practice; and it should not be such as to subject to surprise the
party of whom a demand is claimed to have been made. This

Badeau v. Niles, 9 Abb. N. C., 48.

10 situation might arise under some circumstances which may be imagined. The better rule of practice is that the execution of the penal provision of this statute be dependent upon an order. The parties then may act advisedly, and the trial court, when the admissibility of evidence of the account arises, will be embarrassed by no collateral inquiry into the facts upon which the right of the parties in that respect may depend. By means of an order made upon application preliminarily to the trial, or to the disposition of the question of the admissibility of the evidence, the purpose and mandate of the statute may be effectuated without surprise or unnecessary prejudice to any of the parties.

The reception of the evidence was not error.

The judgment should be affirmed.

All concur except VANN, J., not voting.

Judgment affirmed.

BADEAU v. NILES.

*New York Supreme Court, First Department; Special
Term and Chambers, 1880.*

[Reported in 9 Abb. N. C., 48.]

Evidence by which a cause of action may be established upon the trial should not be pleaded, but only the facts constituting the cause of action.

1 Motion to strike out portions of the complaint.

This action was brought by Marie E. Badeau (a *cestui que trust*), individually and as executrix and trustee under the will of Nathaniel Niles, deceased, against Nathaniel Niles, as executor and trustee under the said will, Amelia R. Wilbaux (a *cestui que trust*), individually, and as executrix and trustee under the said will, and others interested in the will, to remove the said Nathaniel Niles from his trusteeship and to restrain him from further acting as executor.

The complaint, which charged the defendant, Nathaniel Niles, with misconduct and mismanagement of the estate, contained

Ward v. Ward, 5 Abb. Pr. Rep. (N. S.), 145.

extracts from his sworn accounts, and examinations as to them, 2
and also from examinations in another action, and from affidavits,
and a list of vouchers, and criticisms upon the whole.

The defendant moved to strike out these from the complaint
as irrelevant and redundant.

LAWRENCE, J. The motion to strike out the portions of the
complaint specified in the notice of motion should, I think, be
granted. The allegations objected to relate rather to the evi-
dence by which a cause of action may be established upon the 3
trial, than to a statement of the facts constituting a cause of ac-
tion. Even under the Code, I do not understand that it is proper
to plead the evidence by which a cause of action is to be estab-
lished. In other words, the resultant, not the evidentiary, facts
should be pleaded. \$10 costs to defendant to abide event.

WARD v. WARD.

Supreme Court, First District, Special Term, 1868.

[Reported in 5 Abb. Pr. Rep. (N. S.), 145.]

The remedy for superfluous matter in a complaint—such as an allegation
of abandonment, in an action for divorce on the ground of adultery—
is by motion, not by demurrer, although such matter be stated in a
form appropriate to a separate cause of action.

The action was brought for an absolute divorce. The plaintiff 1
in the first four paragraphs of the amended complaint, averred
that the parties were married, had one child, and that the de-
fendant had without his consent abandoned him. The fifth
paragraph “for a further cause of action,” averred the adultery
of the defendant. A general prayer for judgment granting a
divorce *a vinculo*, and the custody of the child, closed the
complaint.

The defendant demurred on the grounds: 1. That several
alleged causes of action were improperly united. 2. That the
abandonment did not constitute a valid cause of action.

Deyo v. Morss, 144 N. Y., 216.

- 2 INGRAHAM, J. There is but one cause of action stated in this complaint, viz.: the adultery. The allegation that the defendant has abandoned and deserted her husband is no ground of divorce, and is improperly inserted in the complaint, but it is not stated as a cause of action, nor is any relief asked for on account of that fact.

The statement in the 5th paragraph, "that for a further cause of action he states, etc.," does not show that there are two causes in the complaint (*Hillman v. Hillman*, 14 How., 456).

- 3 The proper rule is laid down in *Meyer v. Lent*, 7 Abb. Pr., 225, viz.: that in such cases the remedy is by motion, and not by demurrer.

Judgment for plaintiff on demurrer, with leave to answer, etc., and without prejudice to a motion to strike out.

- Note. In *Gassett v. Crocker*, 10 Abb. Pr., 183, defendant alleged in his answer that certain third persons, whose interest in the subject matter of the action appeared from the complaint, were necessary parties to the action, without whose presence a complete determination of the controversy could not be had. Plaintiff moved to strike out such part of the answer.—*Held*, the motion should be granted, it being in substance, a demurrer to the complaint for defect of parties. That such objection is waived if not taken by demurrer, as it appears on the face of the complaint, and the allegation in the answer constitutes no defence to the action, is clearly irrelevant and should be stricken out.

DEYO v. MORSS.

New York Court of Appeals, Dec., 1894.

[Reported in 144 N. Y., 216; rev'g 74 Hun, 224.]

1. Upon application before trial the court has power, in its discretion, to allow an amendment of a pleading so as to substitute a different cause of action upon the same general grounds.*
2. A stipulation, the plain object of which is to enable the parties to do what the court upon application might authorize to be done, authorizes such an amendment.

* But such an amendment cannot be allowed *at* the trial (*Fisher v. Rankin*, 25 Abb. N. C., 191; s. c., p. 204 of this vol.); nor *after* the trial (*Southwick v. First Nat. Bank*, 84 N. Y., 420; s. c., p. 154 of this vol.).

Deyo v. Morss, 144 N. Y., 216.

3. The principle is the same as in the case of an amendment of course before the twenty days from the service of the original pleading have expired, under Code Civ. Pro., § 542, where a change of cause of action may be made.

The original complaint was in the nature of a creditor's suit to reach lands alleged to have been fraudulently transferred to defendants. After issue was joined, plaintiff's attorney obtained a stipulation allowing him on giving notice of electing so to do, "to serve an amended and supplemental complaint, or either." He subsequently served an amended complaint seeking to charge defendants as devisees of the same lands of the deceased debtor, under §§ 1837-60, Code Civ. Pro. 1

The Special Term of the Supreme Court denied defendants' motion to strike out the amended complaint. 2

The General Term reversed the order, holding that the stipulation did not authorize the abandonment of the original cause of action and the substitution of a new one.

The Court of Appeals reversed the order of the General Term, and affirmed the order of the Special Term.

ANDREWS, Ch. J. The stipulation authorized the plaintiff's attorney to serve an amended or supplemental complaint, reserving to the defendants the right to make such motion in relation thereto as they should be advised, and it authorized the defendants to serve an amended or supplemental answer. Before the stipulation was made both parties contemplated making an application to the court for permission to serve amended pleadings. The plain object of the stipulation was to enable the parties, without notice, to do what the court upon application might authorize to be done. The plaintiff's attorney thereupon served an amended complaint, setting out a cause of action based on the statute, art. 2, title 3, chapter 15, of the Civil Code, against the defendants as devisees, to recover the proceeds of real estate devised to them, situated in the state of Pennsylvania, which they had conveyed. The action was brought by the plaintiff as creditor of the decedent, in behalf of himself and all 3 4

Deyo v. Morss, 144 N. Y., 216.

- 5 others similarly situated. The cause of action set out in the original complaint was based upon the theory that the defendants had fraudulently conspired to defeat the claims of creditors by means of a sale and conveyance of the real estate devised, and the complaint asked that the conveyance be set aside, or in the alternative, that the defendants account for the the proceeds received by them on the sale, and for the appointment of a receiver. The causes of action in the two complaints were distinct. The original complaint was based on fraud, and the
- 6 amended complaint on the statute, and in such an action the element of fraud has no place. The General Term reversed the order of the Special Term, which denied a motion in behalf of the defendants to strike out the amended complaint, made on the ground that it set up a new and different cause of action from that in the original complaint. The ground of the reversal seems to have been based on the view that the power of the court to authorize an amendment of a complaint before trial, does not extend to an amendment which changes the cause of action.
- 7 We think the settled practice is opposed to the rule declared by the General Term. Whether an amendment of a pleading shall be allowed in such a case is, in general, a matter of discretion in the court. The General Term has the right to review the exercise of such discretion by the Special Term, and its order made in the exercise of this power of review could not be reviewed here. But the stipulation, by its true construction, authorized such amendment as the court had power to grant, and the case, therefore, depends on the power of the Special Term to authorize an amendment before trial of a complaint, so as to permit
- 8 a substitution of a different cause of action from that originally alleged. We think this question was, in principle, determined in the case of *Brown v. Leigh* (49 N. Y., 78), where it was held that, under section 172 of the former Code, which permitted a pleading to be once amended by a party, of course and without costs, an amendment of a complaint which changed the cause of action and substituted another cause of action belonging to a different class was authorized. The power of amendment given to the court by section 723 of the present Code is entitled at least

to as liberal a construction as the power granted to the party to
 amend as of right under section 172 of the former Code. The
 power of the court to grant or deny the relief, or to impose such
 terms as justice may seem to require, is an adequate protection
 against an oppressive exercise of the power. To deprive the
 court of this power would, in many cases, result in injustice and
 encourage litigation. The present case is an illustration. The
 causes of action were legally distinct, but the purpose of both
 complaints was to compel the application of the decedent's prop-
 erty to the payment of his debts, and whether the result was
 reached by treating the conveyance by the defendants as fraudu-
 lent, or by compelling them to account for the proceeds of the
 property, as provided under the statute, does not affect the sub-
 stantial purpose of the action. The amended complaint relieved
 the defendants from the imputation of fraud, and in that re-
 spect might be deemed more favorable to them. If they could
 have defeated the action in its original form, this was no just
 reason why they should not, by amendment of the complaint, be
 put in a position where the real controversy as between the
 creditors and themselves may be tried and adjudicated.

The order of the General Term should be reversed and that of
 the Special Term affirmed, with costs in both courts.

All the judges concurred.

Ordered accordingly.

MUSSINAN v. HATTON.

New York Superior Court, Special Term, 1894.

[Reported in 81 Abb. N. C., 254.]

1. Where the first amended complaint has been stricken out, plaintiff is not entitled to serve a second amended complaint, as of course, under Code Civ. Pro., § 542—authorizing a pleading to be amended once as of course.
2. *It seems* that a complaint may be amended, as of course, under Code Civ. Pro., § 542, so as to set up an entirely new cause of action.

Mussinan v. Hatton, 31 Abb. N. C., 254.

1 **Motion to strike out an amended complaint.**

GILDEESLEEVE, J. This is a motion to strike out an amended complaint. Before service of the answer to the original complaint, the plaintiff served an amended complaint, which was subsequently stricken out by the court, on motion of defendant. After the amended complaint had been so stricken out, the defendant served his answer to the original complaint, and, within twenty days thereafter, plaintiff served another amended complaint. The defendant now moves to strike out this second

2 **amended complaint.**

The question here presented is: Can the plaintiff serve two amended complaints—that is, when the first amended complaint has been stricken out, can plaintiff serve a second amended complaint, as of course, without costs and without prejudice, under § 542 of the Code? That section of the Code permits a pleading to be amended “once by the party, of course, without costs, and without prejudice to the proceedings already had,” etc., “within twenty days after the pleading, or the answer or demurrer thereto, is served, or at any time before the period for answering it expires,” etc. This second amended complaint was served within twenty days after service of the answer to the original complaint, and was, therefore, served within the statutory limit of time. (*Seneca Bank v. Garlinghouse*, 4 How. Pr., 174.) But, having already served one amended complaint, can plaintiff serve another under the above section of the Code? I think not. The Code particularly states that the complaint may be once amended. The Code gives plaintiff an absolute right to amend his complaint once, subject to the right of the court to strike out for cause shown. (*Cooper v. Jones*, 4 Sand., 699; *Frank v. Bush*, 63 How. Pr., 282.) The plaintiff has availed himself of this right, and his amended complaint has been stricken out by the court. He can not go on serving amended complaints indefinitely. I can find no authority to support the contention that plaintiff can serve a second amended complaint, as a matter of right, under § 542 of the Code. Of course under § 544 of the Code, plaintiff is at liberty to apply to the court for permission to serve a supplemental complaint; but I am of opinion that he has already exhausted his rights under § 542 of the Code.

Cashman v. Reynolds, 123 N. Y., 138.

The ground, however, that the proposed amended complaint should not stand, for the reason that it sets up a new cause of action, is not tenable, for under § 542 of the Code, the plaintiff may amend by alleging an entirely new cause of action, because this section contains no restriction as to the nature of the amendments (*Robertson v. Robertson*, 9 Daly, 44-52; *Devine v. Duncan*, 2 Abb. N. C., 328); but all the causes set forth in the amended complaint should be of the same class and of a class to which the summons is appropriate. (*Brown v. Leigh*, 49 N.Y., 78.)

I am of opinion that the motion to strike out this second amended complaint must be granted, with \$10 costs, with leave to the plaintiff to make such application to the court as he may think proper with regard to any further pleading.

CASHMAN v. REYNOLDS.

New York Court of Appeals, 1890.

[Reported in 123 N. Y., 138.]

The right given by Code Civ. Pro., § 542 to amend of course one's own pleading, within twenty days after serving it, does not extend to withdrawing a demurrer by serving an answer instead.

The distinction between the function of demurrer and of answer stated.

Action for foreclosure.

The Special Term denied a motion made by defendants to compel plaintiff to accept service of an answer as an amendment of a demurrer.

The General Term affirmed the order.

The Court of Appeals affirmed the order.

O'BRIEN, J. The defendants in this case sought, as matter of right, to amend a demurrer which raised an issue of law by the service of an answer which, if allowable, changed the issue into one of fact. The plaintiff refused to receive the answer served as amendment to a demurrer and then the defendants invoked

Cashman v. Reynolds, 128 N. Y., 188.

- 3 the powers of the court to compel him to do so. The court held that it had no power to force this practice upon the plaintiff, and the General Term is of the same opinion.

- As the order decided a question of power in the courts below, it is reviewable here. The amended complaint stated a cause of action against the defendants for the foreclosure of a mortgage, and on the last day that the defendants could plead to it they served a joint demurrer specifying, as the defect appearing on the face of the complaint, that causes of action had been improperly united. The plaintiff then gave notice of a motion for
4 judgment on the ground that the demurrer was frivolous, to be heard January 6, 1890. Before this motion could be heard, and on January 3, 1890, the defendants served a verified answer, accompanied with a notice that the same was a substitute for and amendment of the demurrer, and that the defendants claimed the right to serve it pursuant to section 542 of the Code of Civil Procedure. Whereupon the plaintiff's attorney returned it, specifying as the reasons, that as an answer it was served too late, and that as an amendment to the demurrer the defendants had
5 no right to serve it under section 542 of the Code. The defendants' attorney then gave notice of a motion that the court, by order, compel the plaintiff's attorney to receive the answer as properly served in the case. The result of this motion has already been stated.

- We have examined the elaborate brief submitted by the defendants' counsel in support of this appeal, calling our attention to the ancient practice in regard to amendments of pleadings, the usages of parliamentary bodies as to amendments generally, and the more recent and it may be added somewhat conflicting
6 decisions of the courts in the first and second judicial departments in regard to this question. But we are satisfied that the practice which we are asked to sanction is not authorized by the statute, and that the order of the courts below was right.

When a complaint is served, the defendant has twenty days in which to determine whether he has any defence to the cause of action therein stated, and if he has no defence, there is no occasion for any pleading on his part. If he has a defence and

III. *Technical Rules.* (11) Amendment of Pleading. 591

Cashman v. Reynolds, 123 N. Y., 138.

it arises out of facts not disclosed by the complaint, he can present these facts to the court by the service of an answer, or if the defence is upon the law, conceding all the facts stated in the complaint to be true, he can present that question to the court by the service of a demurrer. Both the answer and the demurrer are included in the general term "pleadings" as used in the Code of Civil Procedure; but the office of the one is entirely different and distinct from the other. 7

The answer raises an issue of fact to be determined by proofs upon a trial for that purpose, while the demurrer, conceding all the facts alleged in the complaint, raises an issue of law, to be determined by the court, and as the word itself implies, when a demurrer is served, all other proceedings in the cause stop until the question of law raised thereon is decided. The defendant may, within the proper time, present his defence, whether it arises upon the facts or the law by the use of either one or the other of these pleadings, but he cannot, as matter of right, be entitled to serve both, as a defence to the same cause of action. 8

By section 542, whichever form of pleading he concludes is necessary to present his defence may be amended by him, of course, within twenty days after its service has been made. If it be an answer, the facts may be stated in another way, or other facts added, or some of those first stated omitted entirely. If it be a demurrer, its form may be changed or other additional grounds may be alleged. But an issue of law cannot be changed by an amendment, of course, to an issue of fact, nor can the latter be, by such process, converted into an issue of law. When the party demurs he elects to admit the facts stated by his adversary, and to rest his case upon the law arising upon these facts, which he claims by the demurrer is in his favor. Hence the defendants in this case could have amended their demurrer within the twenty days by the service of another demurrer so changed as to meet the requirements of the case. But they could not amend a demurrer, presenting only a question of law by serving an answer presenting a question of fact. Such a change of position by the pleader is not, in any just sense, and certainly not within the meaning of section 542, an amendment at all, but 9 10

Mapes v. Brown, 14 Abb. N. C., 94.

- 11 an entire change of the line of defence from the law to the facts, and is not permitted by either the letter or the spirit of the Code of Civil Procedure.

When a party has made a mistake by serving a demurrer when he should have served an answer, he can be relieved from the consequences of his mistake by an application to the court, and in that way permitted to substitute an answer for a demurrer, or *vice versa*; but such a change cannot be made as matter of right. The court may allow it to be done when satisfied that justice requires it and upon such terms as it may consider just.

- 12 The cases of *Wise v. Gessner* (47 Hun, 306) and *Smith v. Laird* (44 *id.*, 530) were correctly decided.

The order appealed from should be affirmed, with costs.

All the judges concurred.

Order affirmed.

MAPES v. BROWN.

New York Supreme Court, Special Term, 1884.

[Reported in 14 Abb. N. C., 94.]

Although plaintiff cannot amend his summons without application to the court, yet the irregularity of so doing is waived by the defendant's retaining the amended summons, or may be cured, on a motion to strike out the amended summons, by granting a cross-motion for leave to amend it.

- 1 Motion by defendant to strike out an amended summons and complaint; cross-motion by plaintiff for leave to amend the summons.

LAWRENCE, J. It is undoubtedly true that the plaintiff could not amend the summons without an application to the court (see Code Civ. Pro., §§ 723, 727). This was the rule under the old Code (see 1 Wait's Practice, 490), where it is stated that the power of amending once as of course, conferred on parties to an action by section 172 of the Code, relates to pleadings and not to process. The various cases under the old Code upon this

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Anderson v. Horn, 23 Abb. N. C. 475.

subject are also there collected. The amended summons was 2
therefore irregular but I see no reason for striking it out, inas-
much as the defendants who make this motion retained the
same from the 14th to the 22d of March, and thereby, I think,
lost their right to object thereto (*Hollister v. Livingston*, 9 How.
Pr., 140).

Even if this view is not correct, I do not see that the defend-
ants who make this motion can sustain any damage from the
amendment of the summons. Simultaneously with the argu-
ment of this motion, a motion was presented to the court asking 3
for leave to amend the summons. The motion, so far as it
respects the striking out of the summons, will, therefore,
necessarily be denied.

ANDERSON v. HORN.

New York City Court, Special Term, 1889.

[Reported in 23 Abb. N. C., 475.]

1. A defendant ought to be sued in his true name which is the surname
of his ancestors, and the Christian name given to him in baptism
[unless it has been altered according to law]*. If defendant is known
by two names, he may be sued by either, or by that by which he is
generally known, though not his real name, or if the real name be
unknown he may be sued by a fictitious name, adding a description
identifying the person intended.
2. Where on an application to vacate judgment it appeared that the
defendant was sued as John Horn, and in his answer he described
himself as John A. Horan, the court ordered the parties to appear
for oral examination in order to ascertain the true name of the
defendant or his *alias dictus*.

Motion by defendant to vacate judgment and to allow him to 1
defend on his merits.

The defendant in this action was sued under the name of
John Horn. Defendant served his answer denying all the
allegations of the complaint and describing himself as John A.
Horan. Service of the answer was duly admitted by plaintiff's

* See Code Civ. Pro., § 2410.

Anderson v. Horn, 28 Abb. N. C., 475.

- 2 attorney. Two days after the answer was served, and late in the day on which the defendant's time to answer expired, the plaintiff's attorney returned the answer and withdrew the admission of service, on the ground that there was no action pending between the plaintiff and John A. Horan. Judgment was entered against the defendant on the same day.

- McADAM, Ch. J. A defendant ought to be sued in the surname of his ancestors, and the Christian name given to him in baptism (*Bank of Havana v. Magee*, 20 N. Y., 355, 363). If the
- 3 defendant is known by two names he may be sued by either (*Eagleston v. Son*, 5 Robt., 640), or that by which he is generally known, though not his real name (*Cooper v. Burr*, 45 Barb., 9), or if the real name be unknown he may be sued by a fictitious name, adding a description identifying the person intended (*Code Civ. Pro.*, 451), such as "the man in command of the ship *Hornet*" (*Pindar v. Black*, 4 How. Pr., 95). This liberality in practice fails however to prevent the ever recurring confusion caused by misnaming the defendant, an error which becomes
- 4 more difficult to repair as the proceedings advance. The plaintiff charges that the defendant engaged board under the name of "John Howard," and that his correct name is "John Horn," and by this name the defendant was sued. He undertook to defend in the name of "John A. Horan," which he claims to be his correct cognomen. His plea was returned. It is not a case of misspelling or of *idems sonans*, but of misnomer or nothing. The court must first ascertain the defendant's true name or his *alias dictus* before it can undertake to decide whether he has been correctly proceeded against or not. When
- 5 the facts are settled, there will be no trouble in correctly applying the law.

The parties must appear in court for oral examination on June 11, at 2 P. M. On the conclusion of the examination the application will be decided.

Spence v. Griswold, 23 Abb. N. C., 239.

SPENCE v. GRISWOLD.

New York Common Pleas, Special Term, 1889.

[Reported in 23 Abb. N. C., 239.]

1. The plaintiff having sued the wrong person cannot cure the error by a motion in the action to substitute the right person as defendant.
2. The fact that the Mechanic's Lien act*—the action being brought to foreclose a mechanic's lien,—provides that a lien shall not be invalid because of a mistake in the name of the owner in the notice of claim, does not give the plaintiff the right to substitute a new defendant.

Motion by plaintiff to substitute other defendants in the stead 1
of the defendant sued.

Plaintiff sued Wayne Griswold to foreclose a mechanic's lien. It appeared that Griswold, against whose name the lien was filed, was not the owner of the premises, but that the same were owned by Griswold's wife, Anna L., who, during the pendency of this action, sold them to Mary Hopkins.

The plaintiff now moved to substitute Anna L. Griswold and Mary Hopkins as defendants in the stead of Wayne Griswold.

VAN HOESEN, J. Wayne Griswold is the sole defendant, and he ought not to have been made a party to the action, as he has no interest in the subject matter and as no relief can be obtained against him.

The plaintiff has sued the wrong party and he now wishes to sue the right one, but the difficulty is that he is attempting to use this action as a vehicle for making an exchange of defendants. If he had a defendant before the court who was a proper party to the action he might well ask that other defendants should be brought in when he had shown that their presence was necessary to the determination of the controversy; but there is no way known to our law by which, when a plaintiff has sued the wrong man, he can cure the error by making the right man a supplementary party. This is well settled (*Davis v.* 3

*L. 1885, c. 342.

Riley v. Stern, 23 Abb. N. C. 435.

- 4 The Mayor, 14 N. Y., 506, 527; N. Y. State Monitor M. P. Assoc'n v. Rem. Assoc'n, 89 *id.*, 22).

The suggestion that the Mechanic's Lien act provides that a lien shall not be invalid because of a mistake in the name of the owner in the notice of claim, does not aid the plaintiff. The question here is, as to the right of the court to strike out the name of one who ought never to have been made a party, and to insert in its stead the name of another person.

- 5 Code Civ. Pro., § 452, does not provide for such a case. It authorizes the bringing in of new parties whose presence is necessary to the determination of a controversy between parties to the action. But there is no controversy between Wayne Griswold and the plaintiff, and the presence of Mrs. Hopkins and Mrs. Griswold is not necessary for the determination of any such controversy. The plaintiff may attempt to bring a new action, but he cannot in this action substitute Mrs. Hopkins and Mrs. Griswold in the place of Wayne Griswold.

- 6 Motion denied.

RILEY v. STERN.

New York City Court, Special Term and Chambers, 1889.

[Reported in 23 Abb. N. C., 335.]

The court has power, where there are several defendants, to strike out the name of one or more who have been erroneously included, and substitute the name of another person who is properly a party.

- 1 Plaintiffs sued the members of the firm of S. & M. Stern for goods sold. It appears, by the affidavit on which this motion was made, that when the summons and complaint were drawn, the names of the persons composing the co-partnership of S. & M. Stern, were taken from Trow's Co-partnership Directory for 1889, in which it was stated that the names of the co-partners were Solomon, Moses and Henry Stern. The answers of Solomon and Moses Stern to the complaint set up that Henry Stern was at no time a co-partner in the said firm of S. & M. Stern, but

McKane v. Dem. Gen. Com. of Kings Co., 21 Abb. N. C., 89.

that the said firm was composed of the defendants and one 2
Bernard Pasternak, and that the latter should have been made a
party defendant. Whereupon this motion was made by plaint-
iffs to have the name of Henry Stern in the action stricken out
and the name of Pasternak inserted in place thereof.

McADAM, Ch. J. The court may strike out parties and add
others (Code, § 723). The only limitation on the power is that a
sole defendant cannot be stricken out and another substituted in
his place (*Re Gilleran*, 7 N. Y. Suppl., 145; *Davis v. Mayor*, 14 3
N. Y., 506, 527; N. Y. State Monitor, etc., *Asso. v. Remington*,
etc., Works, 89 *id.*, 221). Motion to strike out the name of
Henry Stern granted on payment to his attorney of \$10 costs,
and application to join the name of Bernard Pasternak with
those of the two remaining defendants granted, without costs.

McKANE v. DEMOCRATIC GENERAL COMMITTEE OF KINGS COUNTY.

*New York Supreme Court, Second District, Special Term,
May, 1888.*

[Reported in 21 Abb. N. C., 89.]

Where a voluntary unincorporated association was sued in its own name,
but the summons was served on its president, an amendment of the
title of the action will be allowed upon terms, changing the defend-
ant's name to that of its president; * in order to comply with Code
Civ. Pro., § 1919, † allowing such an association to sue or be sued in
the name of its president or treasurer.

Bassett v. Fish, 75 N. Y., 303, and N. Y. Monitor Milk Pan Assoc. v.
Remington Agricultural Works, 89 N. Y., 22, distinguished.

* Compare for case of service on the wrong defendant, *Spence v. Griswold*, 23 Abb. N. C.,
239; s. c., p. 596 of this vol. and see also 1 Abb. New Pr. and F., 722.

† Code Civ. Pro., § 1919 is as follows:

"An action or special proceeding may be maintained by the president or treasurer of an
unincorporated association, consisting of seven or more persons, to recover any property, or
upon any cause of action, for or upon which all the associates may maintain such an action or
special proceeding, by reason of their interest or ownership therein, either jointly or in
common. An action or special proceeding may be maintained against the president or treasurer
of such an association, to recover any property, or upon any cause of action, for or upon
which the plaintiff may maintain such an action or special proceeding, against all the associates,
by reason of their interest or ownership, or claim of ownership therein, either jointly or in
common, or their liability therefor, either jointly or severally. Any partnership, or other
company of persons, which has a president or treasurer, is deemed an association within the
meaning of this section."

McKane v. Dem. Gen. Com. of Kings Co., 21 Abb. N. C., 89.

- 1 This action was brought by John Y. McKane against The Democratic General Committee of Kings County, naming it in the summons and complaint as defendant, wherein the plaintiff sought to have his right to membership in the defendant established.

- The summons and complaint were served on John P. Adams, the president of the defendant, who appeared and interposed a demurrer on the ground that there was a defect of parties defendant, because the defendant committee could not be sued as such in its own name, or in its aggregate capacity, and on the
- 2 further ground that the complaint did not state a cause of action. The defendant did not otherwise appear in the action. The plaintiff then moved to amend the summons so as to make the title of the action read: "John Y. McKane, plaintiff, *versus* John P. Adams, as president of the Democratic General Committee of Kings County, defendant;" and to amend the complaint by asserting therein an allegation that the Democratic General Committee of Kings County is an unincorporated political association, consisting of more than seven persons, and that
 - 3 John P. Adams is the president thereof.

- BARTLETT, J. An examination of the complaint shows that the cause of action, if any, set up therein, is against those persons who comprise the Democratic General Committee of Kings County. Assuming that body to be a voluntary association, within the meaning of section 1919 of the Code of Civil Procedure, it can properly be sued only by making all its members defendants, or by naming as defendant the president or treasurer. Neither course has been pursued by the plaintiff,
- 4 and this motion presents the question, whether his failure properly to name the defendant is a fatal defect, or whether he can correct it by amendment instead of bringing a new suit.

The Democratic General Committee, as such, has not appeared in the action, but Mr. John P. Adams, who was served with the summons, has interposed a demurrer, on the ground that there is a defect of parties defendant, because the committee cannot be sued as such in its own name or in its aggregate capacity, and on the further ground that the complaint does not state facts

sufficient to constitute a cause of action. The motion is opposed 5
 by counsel for Mr. Adams, who relies upon two cases in the
 Court of Appeals as authorities against the power to grant it.
 The first of these cases is *Bassett v. Fish*, 75 N. Y., 303, where-
 in it was held that the complaint could not be amended by
 striking out the names of defendants who were sued as school
 trustees, and inserting the name of a corporate board of education
 to which they belonged. There, however, no attempt had been
 made to bring the corporation as such into court. Here, on the
 contrary, the plaintiff has endeavored to bring into court the 6
 voluntary association against which he seeks to enforce some
 right. He has caused the proper officer of that association to be
 served with process, and has simply omitted to name that officer
 in the title of the action as president of the association. The
 other case to which the court has been referred is the *N. Y.*
State Monitor Milk Pan Association v. Remington Agricultural
Works, 89 N. Y., 22,* which simply holds that section 723 of
 the Code does not authorize the court to strike out the name of
 a sole defendant in an action, and insert in lieu thereof the names
 of other persons as defendants. But that is not what the 7
 plaintiff seeks to have done in this action. The purpose of
 section 1919 of the Code, is to permit an unincorporated
 voluntary association to sue or be sued in the name of its
 president or treasurer. The association and not the officer is
 the real party in interest. So here, it is the Democratic General

* Rev'g 25 Hun, 475, on the ground that while full authority is
 conferred by the Code Civ. Pro., § 723, for adding or striking out the name
 of a person or a party, or correcting a mistake in such name, it does not
 sanction an entire change of name of the defendant by the substitution of
 another or entirely different defendant. The court below held that such
 power was within the discretion of the court under section 723.

In *Munzinger v. The Courier Co.*, Sup. Ct., Gen'l Term, First Dep.,
 Dec., 1894, (to be reported in 82 or 83 Hun), it was held (VAN BRUNT, P. J.,
 dissenting), that where plaintiff had sued a voluntary unincorporated
 association in its own name, under the belief that it was a corporation
 and so alleging in his complaint, the court has power under § 723 to allow
 an amendment of the summons and complaint by changing the title of
 the action so as to designate an individual as president of the association in
 compliance with C. C. P., § 1919, and also by changing the allegation that
 defendant is a corporation, to one that it is an unincorporated association.

Lassen v. Aronson, 29 Abb. N. C., 114.

- 8 Committee and not Mr. Adams that the plaintiff really desires to sue. But the effect of the statute is to prescribe, not that a voluntary association cannot be sued, but that it cannot be sued except in the name of certain officers, unless the plaintiff chooses to name all the associates individually as defendants. In allowing an amendment, therefore, which shall bring the name of Mr. Adams into the title of this action, the court does not strike out the name of the real defendant, but merely permits
- 9 a formal correction of the designation which has been employed so as to conform to the requirements of the statute.

Inasmuch as the right person was actually served, I think the omission of his name from the title of the action should be regarded simply as a misnomer, and that the court has the power to grant the amendment asked. Since, however it will compel the defendant to change the form of its demurrer, \$10 costs should be allowed on this account, as well as \$10 costs of motion. Motion granted on payment by plaintiff of \$20 costs.

Ordered accordingly.

LASSEN v. ARONSON.

New York Superior Court, Special Term, 1892.

[Reported in 29 Abb. N. C., 114.]

1. The failure to comply with the Code Civil Pro., § 1897—providing that in actions for a penalty or forfeiture given by statute, if the complaint is not served with the summons, a general reference to the statute must be indorsed on the summons so served—is fatal to the validity of the service of the summons and leaves the court without jurisdiction over the person of the defendant.
 2. Such defect, since it does not appear on the face of the summons, is not remedied by defendant's voluntary appearance.*
- 1 Motion by defendant for leave to withdraw his notice of appearance and to set aside the service of a summons in an action for a penalty upon the ground that the summons was served without the complaint and without an indorsement of a

* The contra was held in *Bissell v N. Y. Central, etc., R. R. Co.*, 67 Barb., 385.

McRoberts v. Pooley, 1 N. Y. St. Rep., 725.

general reference to the statute under which the action was brought, as required by Code Civ. Pro., § 1897. 2

The action was brought by Alexander C. Lassen against Albert Aronson under the laws of 1890, chapter 564, § 29, to recover a penalty for defendant's refusal to allow an inspection of the books of a stock corporation.

After the service of the summons without the complaint, defendant's attorney served a notice of appearance. This motion was made upon defendant becoming aware of the nature of the action by the service of the complaint. 3

GILDERSLEEVE, J. The failure to comply with the provisions of section 1897 of the Code is fatal to the validity of the service of the summons, and leaves the court without jurisdiction over the person of the defendant. The defect was not remedied by the defendant's appearance for the reason that it did not appear upon the face of the summons.

Defendant has leave to withdraw his notice of appearance. 4
Summons set aside and complaint dismissed, with costs.

McROBERTS v. POOLEY.

Superior Court of Buffalo, General Term, 1886.

[Reported in 1 N. Y. St. Rep., 725.]

1. It is not necessary that a supplemental complaint should set up all the facts constituting the plaintiff's cause of action, or showing that those originally made defendants are proper parties to the action; nor is it necessary that it should repeat the allegations of the original complaint.
2. The essential purpose of a supplemental complaint is to set out such material facts as have occurred since the former complaint [or of which plaintiff was ignorant when it was made], which may change the position and rights of the parties, and vary the relief to which plaintiff is entitled.

Plaintiff, by leave of court, served a supplemental complaint, 1
to which defendant demurred. The issue of law thereon was
tried at the General Term of the court, in the first instance, as
is the practice in that court [C. C. P., § 297.]

McRoberts v. Pooley, 29 Abb. N. C., 114.

- 2 SMITH, Ch. J. The original complaint in this action, as amended, shows that it was commenced to foreclose a mortgage upon real estate, executed by the defendant Mary A. Pooley and others. She put in an answer, which still stands as a pleading in the action, by which she denied each and every allegation contained in the amended complaint, and also averred that each and every mortgage, claim and demand set forth therein had been fully paid, satisfied and discharged before this action was commenced. Afterwards the plaintiff obtained an order of this court permitting him to serve a supplemental complaint, by
- 3 which he averred that the real estate upon which the mortgage in suit was executed had been sold upon the foreclosure of a prior mortgage thereon, that certain surplus moneys, arising under the last mentioned foreclosure, had been applied upon the plaintiff's mortgage debt, and that by means of certain other securities held by the plaintiff he had realized a further sum which had been also applied on his mortgage debt, by means whereof that debt had been reduced from the amount claimed in the amended complaint (which was \$8,397.19 besides interest)
- 4 to the sum of \$1,906.38, and interest for which he demands judgment, who, as the amended complaint alleges, are personally liable to pay the same. The amended complaint prayed for judgment against the same defendants for so much of the mortgage debt as should not be satisfied by a sale of the mortgaged premises on the judgment of foreclosure sought in the action.

- 5 This defendant demurs to the supplemental complaint upon two grounds; first, that there is a defect of parties defendant, in that she is not a necessary or proper party to the cause of action stated in that complaint; and second, that the supplemental complaint does not state facts sufficient to constitute a cause of action against her.

The defendant who interposes this demurrer seems to have wholly misapprehended the office and province of a supplemental complaint. The Code (§ 544) provides that the court may permit a party "to make a supplemental complaint, answer, or reply, alleging material facts which occurred after his former pleading, or of which he was ignorant when it was made,

including the judgment or decree of a competent court, rendered 6
after the commencement of the action, determining the matters
in controversy, or a part thereof."

Obviously it is not necessary, nor was it ever intended, that
the supplemental complaint should set up all the facts constitut-
ing the plaintiff's cause of action, or showing that those originally
made defendants were proper parties to the action.

Its province is only to set out such material facts as have
occurred since the former complaint which may have changed
the position and rights of the parties, and thus varied the relief 7
to which the plaintiff is entitled. This is sometimes the result
of a judgment or decree in another action determining the mat-
ters in controversy between the parties or some part thereof.
Such is the case here.

The foreclosure of the prior mortgage upon the same premises
as were covered by the plaintiff's mortgage, and the sale of those
premises for a sum which created a surplus, which the plaintiff
was entitled to have applied on his mortgage debt, and which
had been so applied, made a very material change in the rights
of the parties to the action, and when properly brought before 8
the court show that the plaintiff no longer requires, or should be
allowed to have, a foreclosure of his mortgage; and that the
relief to which he is now entitled, and the only relief he can
have in the action, is a personal judgment against the defend-
ants liable to pay the debt secured by his mortgage for as much
of that debt as now remains unpaid. To show how the plaintiff's
rights have changed since he commenced his action, and to what
relief he is now entitled is the only purpose of his supplemental
complaint. It is not necessary that he should repeat the allega- 9
tions contained in his amended complaint. That is still before
the court, a part of the record, and when read with the supple-
ment thereto shows the present state of the plaintiff's demand
and the relief which he now asks for.

These considerations show that the demurrer cannot be sus-
tained, because it was not necessary that the supplemental com-
plaint should show all the facts constituting the plaintiff's cause
of action, or that the defendant who demurs was properly made
a party to the action, but only those facts arising since the

McRoberts v. Pooley, 29 Abb. N. C., 114.

10 former complaint, which have changed the rights of the parties and made other relief proper than that demanded in that complaint. See Abbott's Annual Digest for 1884, p. 262, note of decision in *Frericks v. Coster*.

11 The defendant's counsel thinks his client has no resource but to demur, and that if she does not judgment will be taken against her. But this is not so. If the allegations of the supplemental complaint are true she must admit them, and that cannot deprive her of any right. If they are false she can deny them, and the plaintiff can gain nothing, nor can she lose anything, by his false allegations. When she comes to trial she may stand on her original answer, and if then the plaintiff proves no cause of action against her, she will have judgment dismissing his complaints, both the former and the supplemental one, as to her, and with or without costs, as equity shall require. Clearly the plaintiff can have no judgment against her unless, upon the facts appearing upon his former complaint and the supplemental one, taken together and proved on the trial, he shows an existing cause of action against her, and that he is entitled to relief
12 against her also.

There must be judgment for the plaintiff upon the demurrer, with leave to defendant to answer in twenty days, on payment of costs.

BECKWITH and TITUS, JJ., concur.

ADDENDA.

NOTES OF RECENT CASES.

COMPLAINTS IN ACTIONS FOR THE PRICE OF GOODS SOLD.

[Principal Case, p. 1, this Vol.]

California.—*Bedel v. Kowalsky*, 99 Cal., 286; s. c., 33 Pac. Rep., 904. (Where acceptance is alleged, complaint is not demurrable, though it fails to show delivery within the time agreed.) *Illinois*.—*Keyes v. Binkert*, 48 Ill. App., 259. (In an action on express contract, no allegation of defendant's promise to pay the damage which the law imposes for the breach of the contract is necessary; otherwise if the action is on a constructive contract.) *Indiana*.—*Neal v. Shewalter*, 5 Ind. App., 147; s. c., 31 N. E. Rep., 848. (In an action for the price of goods sold under an executory contract, which stipulated that the goods should be first class, plaintiff need not allege that they were first class.) *Maine*.—*Wellington v. Milliken*, 82 Me., 58; s. c., 19 Atl. Rep., 90. (An averment of a subsequent parol agreement changing the place of delivery is traversable, and must be laid on some particular day.) *Nebraska*.—*Powder River Live Stock Co. v. Lamb*, 38 Neb., 339; s. c., 56 N. W. Rep., 1019. (Complaint held bad on demurrer, which set up a verbal contract for the sale of goods of over the value of \$50, and attempted to take the contract out of the statute by merely alleging a delivery of the goods to the defendant without averring that he received and accepted them.) *New York*.—*Logan v. Berkshire Apartment Ass'n*, 3 Misc., 296; s. c., 23 N. Y. Supp., 776; 52 State Rep., 132. (Where defendant's acceptance is alleged, performance by plaintiff within the time fixed by the contract, or within a reasonable time, need not be alleged.) *Oregon*.—*Duzan v. Meserve*, 24 Oreg., 523; s. c., 34 Pac. Rep., 548. (Complaint alleging the sale of plaintiff's right, title and interest in the goods is not defective for failing to define plaintiff's interest in the property.) *United States*.—*Buckstaff v. Russell*, 151 U. S., 626; s. c., 14 Supm. Ct., 448. (In an action for a deferred payment for machinery delivered, complaint need only allege the delivery and the expiration of the time in which the payment was to be made, without alleging the fulfillment of a warranty that the machine should work to defendant's satisfaction, though the contract provided to the effect, that in case the machine was not satisfactory, and plaintiffs on notice failed to make it so, defendant might declare the contract paid in full, or demand back what had been paid with damages, and surrender the machine.) *Washington*.—*Tingley v. Fairhaven Land Co.*, Wash., 1894, 36 Pac. Rep., 1098. (Where it is alleged that defendant took possession of the goods, an allegation of a tender thereof is unnecessary.)

COMPLAINTS IN ACTIONS FOR THE VALUE OF GOODS SOLD AND DELIVERED.

[Principal Case, p. 1, this Vol.]

Alabama.—*Smith v. Dick*, 95 Ala., 311; s. c., 10 So. Rep., 845. (In an action on an account for merchandise sold, it is sufficient to allege that plaintiff claimed "of defendant the sum of \$100 for a mule that plaintiff sold defendant.") *California*.—*Behlow v. Short*, 91 Cal., 141; s. c., 27 Pac. Rep., 546. (Complaint is not ambiguous or uncertain because it fails to state where the goods were sold.) *Colorado*.—*Wilcox v. Jamison*, Colo., 1894, 36 Pac. Rep., 902. (An averment of defendant's indebtedness in a specified sum, and that he has not paid any part thereof, is equivalent to an averment that the indebtedness is due and unpaid, there being nothing to indicate the contrary.) *Indiana*.—*Jaqua v. Shewalter*, Ind. App., 1893, 36 N. E. Rep., 173; reargument, 37 *id.*, 1072. (Complaint must allege that the debt is due and unpaid.) *Michigan*.—*Allis v. Voigt*, 83 Mich., 537; s. c., 47 N. W. Rep., 334. (Under the common counts for a machine sold and delivered, plaintiff cannot recover for an extra wheel which he furnished because the original wheel had been broken by defendant's truckman, as defendant's liability therefor would not depend merely upon the questions, whether the wheel was furnished and whose duty it was to furnish it, but would involve other issues, as to whether defendant was responsible for his servant, and if the servant was negligent.) *Richards v. Burroughs*, 62 Mich., 117; s. c., 28 N. W. Rep., 755. (It is not necessary to set forth the contract or the breach thereof.) *Robinson v. Watson*, 101 Mich., 466; s. c., 59 N. W. Rep., 811. (It is sufficient to allege defendant's promise to plaintiff's assignor, without alleging promise to plaintiff.) *Minnesota*.—*Pioneer Fuel Co. v. Hager*, Minn., 1894, 58 N. W. Rep., 828. (Complaint alleging that "defendant is indebted to plaintiff in the sum of \$321.23, upon an account for goods sold and delivered to him at his request," is bad both at common law and under the new procedure, in that it does not state by whom the goods were sold.) *New York*.—*Swan Lamp Manuf. Co. v. Brush-Swan Electric L. Co.*, 18 N. Y. Supp., 869; s. c., 46 State Rep., 535. (Under the Code of Civil Procedure, a party who has fully performed a special contract for sale of goods may count on the implied assumpsit of the purchaser to pay the stipulated price, and is not bound to declare specially on the agreement.) *Newton v. Browne*, 6 Misc., 603; 56 State Rep., 605; s. c., 26 N. Y. Supp., 83. (Complaint must allege that the debt is unpaid.) *South Carolina*.—*Cone Export, etc. Co. v. Poole*, 41 S. C., 70; s. c., 19 S. E. Rep., 203. (Form of complaint approved.) *Texas*.—*Petri v. Neimeyer*, Tex. Civ. App., 1894, 26 S. W. Rep., 266. (Petition not demurrable for failing to show when the demand became due, where it alleges that it is past due and unpaid, and the account attached shows that it has become due.)

SPLITTING CAUSE OF ACTION.

[Principal Case, p. 5, this Vol.]

Colorado.—Hallack v. Gagnon, 4 Colo. App., 360; s. c., 36 Pac. Rep., 70. (Recovery for four months delay, under an agreement to pay a specified sum per month in case of delay in the completion of a building, is not a bar to a recovery for additional delay.) *Indiana*.—Smiley v. Deweese, Ind., 1891, 27 N. E. Rep., 505. (Plaintiff cannot be required to separately state and number different breaches of an entire contract.) *Kansas*.—German Fire Ins. Co. v. Bullene, 51 Kan., 764; s. c., 33 Pac. Rep., 487. (Debtor cannot by assignment split cause of action.) Bolen Coal Co. v. Whittaker Brick Co., 52 Kan., 747; s. c., 35 Pac. Rep., 810. (Recovery on part of a running account bars a recovery on the remaining portion.) *Maryland*.—Olmstead v. Bach, 78 Md., 132; s. c., 27 Atl. Rep., 501. (Only one action lies for a breach of contract of employment because of a wrongful discharge, and employé cannot bring successive actions for installments of wages, though he continues out of employment.) *Michigan*.—Continental Ins. Co. v. H. M. Loud Lumber Co., 93 Mich., 139; s. c., 53 N. W. Rep., 394. (An insurance company, subrogated to a portion of the claim against one whose negligence caused the loss, cannot bring an action to recover only a portion of the damage caused.) *Minnesota*.—Bowe v. Minnesota Milk Co., 44 Minn., 460; s. c., 47 N. W. Rep., 151. (By contract, defendant, a corporation, agreed to take all the milk produced by plaintiff during a year. Before the expiration of the year the defendant corporation dissolved and thereby rendered itself incapable of taking the milk. Held, that defendant's act constituted a breach of the whole contract, and a recovery for failure to take the milk for three months barred another action for failure to take the milk during a subsequent period.) *Missouri*.—Williams v. Kitchen, 40 Mo. App., 604. (Two notes constitute independent causes of action, though given in the same transaction, and a recovery on one after the maturity of both will not bar an action on the other.) *New York*.—Underhill v. Collins, 15 N. Y. Supp., 495. (Where rent is payable in monthly installments, a recovery of all the rent due up to the time of the action, against a tenant who quitted the premises, does not bar an action for installments subsequently falling due.) Miller v. Union Switch & Signal Co., 13 N. Y. Supp., 711; s. c., 37 State Rep., 110. (Where there are several assignments of installments, due at different times, to different assignees, one assignee is not barred from recovering because another assignee has recovered in a previous action, though the installments of both were due when the first action was brought, and the assignor could have maintained but one action for all installments due, if the assignments had not been made.) Samuel v. Fidelity & Casualty Co., 76 Hun, 308; s. c., 27 N. Y. Supp., 741. (In an action for breach of a contract to become surety, recovery was had for the expenses which had then been incurred in getting other sureties, held, that a subsequent action could not be maintained to recover a sum paid to the new sureties which was agreed to be paid upon the happening of a contingency, though it occurred after the former action.) Lorillard v. Clyde, 122 N. Y., 41; s. c., 25 N. E. Rep., 292. (Recovery of a dividend for one year upon a guaranty

of an annual dividend of 7% for seven years does not bar an action upon the guaranty for a dividend of a subsequent year.) *North Carolina*.—*Simpson v. Elwood*, 114 N. C., 528; s. c., 19 S. E. Rep., 598. (Separate actions may be maintained, in order to bring them within the jurisdiction of the justice's court, on each item of an account of goods sold at different times, where the account has not become an account stated.) *Marks v. Ballance*, 118 N. C., 28; s. c., 18 S. E. Rep., 75. (Where separate accounts have been consolidated into an account stated, they cannot afterwards be separated, so as to bring them within the jurisdiction of the justice's court.) *Pennsylvania*.—*Hill v. Joy*, 149 Pa. St., 243; s. c., 24 Atl. Rep., 293. (Recovery of the proportion of oil taken from part of the land leased, which had been reserved as rent, bars a subsequent action for the failure to operate for oil upon other lands included in the lease for which a different proportion of oil was to be paid as rent.) *Terreri v. Jutte*, 159 Pa. St., 244; s. c., 28 Atl. Rep., 225. (A superintendent who agrees to work for a salary and also to board and furnish supplies to workmen, is not barred from recovering from his employer for money paid out for board and supplies by having previously recovered his salary in an action therefor.) *United States*.—*Butterfield v. Town of Onterio*, 44 Fed. Rep., 171. (Interest coupons to a negotiable bond are independent promises, and a recovery on one will not bar a subsequent action on another, though both coupons were due when the first action was brought.)

COMPLAINTS IN ACTIONS UPON BUILDING CONTRACTS.

[Principal Case, p. 32, this Vol.]

Alabama.—*Davis v. Badders*, 95 Ala., 348; s. c., 10 So. Rep., 422. (No special allegation of the obtaining of the architect's certificate is necessary, where it is alleged that plaintiffs have complied with all the provisions of the contract on their part, and erected the building according to the contract.) *Florida*.—*Wilcox v. Stephenson*, 30 Fla., 377; s. c., 11 So. Rep., 659. (Allegation in the short form of the performance of all conditions precedent includes the obtaining of architect's certificate.) *Illinois*.—*Galbrath v. Chicago Architect. Iron Works*, 50 Ill. App., 247. (Where everything has been done, including the obtaining of the architect's certificate, recovery may be had under the common counts.) *Missouri*.—*Williams v. Chicago, etc., Ry. Co.*, 112 Mo., 463; s. c., 20 S. W. Rep., 631. (In an action for work done under a contract by which the compensation for the work was to be determined by an engineer's measurements, under a *quantum meruit*, plaintiff can show that the engineer had not measured the work according to the contract.) *Ray v. Boteler*, 40 Mo. App., 218. (The obtaining of architect's certificate, included in averment in short form of the performance of all conditions precedent by plaintiff.) *New York*.—*Weeks v. O'Brien*, 141 N. Y., 199; s. c., 36 N. E. Rep., 185. (Where an architect's certificate is a condition precedent to payment, builder's complaint must allege generally or

specially the performance of that condition, or set forth facts sufficient to excuse it. It is not enough to allege that the building was completed according to the terms of the contract.) *Gillies v. Manhattan Beach Imp. Co.*, 73 Hun, 507; s. c., 26 N. Y. Supp., 881. (Where the contract has been fully completed, builder may sue on a *quantum meruit*.) *Logan v. Berkshire Apartment Ass'n.*, 18 N. Y. Supp., 164; s. c., 46 State Rep., 14. (Details of contract need not be set out; it is sufficient to allege the terms generally, and upon the trial prove full performance.) *Elting v. Dayton*, 67 Hun, 425; s. c., 51 State Rep., 439; 22 N. Y. Supp., 154. (Though complaint allege full performance, it may be amended so as to allege a modification or waiver of a stipulation, in order to conform it to proof.) *Pennsylvania*.—*Gillison v. Wanamaker*, 140 Pa. St., 358; s. c., 21 Atl. Rep., 861. (In an action on a building contract by which payment for extra work depended upon the architect's certificate of what was reasonable, plaintiff cannot recover for extra work, where no affidavit of defense is interposed, if his statement of claim merely alleges that after the work was done, it was examined and approved by the architect.)

COMPLAINTS IN ACTIONS FOR THE VALUE OF SERVICES RENDERED, THE AGREED COMPENSATION, OR DAMAGES FOR A WRONGFUL DISCHARGE.

[Principal Case, p. 40, this Vol.]

California.—*Foltz v. Cogswell*, 86 Cal., 542; s. c. 25 Pac. Rep., 60. (A complaint alleging both agreed price and the value of services rendered, regarded as on implied contract, and the evidence of the value of the services admitted.) *Burns v. Cushing*, 96 Cal., 669; s. c., 31 Pac. Rep., 1124. (In an action for legal services, complaint alleging that in May and June, 1884, defendant retained plaintiff in certain actions, and that in pursuance of such retainer, plaintiff rendered valuable services to said defendants since May or June, 1884, up to Jan. 29, 1890—is not demurrable because ambiguous; defendant should have demanded a bill of particulars.) *Illinois*.—*Bean v. Elton*, 44 Ill. App., 442. (Under the common counts for labor done, no recovery can be had for damages for breach of the special contract.) *Chicago, etc., R. Co. v. Johnson*, 44 Ill. App., 224. (The agreed compensation may be shown under the common counts.) *Stanhope v. School Directors*, 42 Ill. App., 570. (Where by statute public school teachers are required to have a certificate of qualifications as a condition precedent to their right to receive any portion of public money, the declaration of a teacher in an action for salary must allege compliance with such condition, and it is not enough to aver generally, that the teacher is legally or lawfully qualified.) *Mount Hope Cem. Ass'n v. Weidenman*, 139 Ill., 67; s. c. 28 N. E. Rep., 834. (Where the common counts have been filed, it is not improper to allow amendment by filing a special count founded on breach of contract.) *Indiana*.—*Brickey v. Irwin*, 122 Ind., 51; s. c. 23 N. E. Rep., 694. (In an action for

professional services, complaint is demurrable, if it contain no allegation that defendant is indebted to plaintiff, or that the sum she promised to pay is due and unpaid.) *Puterbaugh v. Puterbaugh*, 7 Ind. App., 280; 33 N. E. Rep., 808. (Complaint regarded as on *quantum meruit*, which alleged that defendant's testator agreed to provide for plaintiff in his will, if he would live with him, that deceased failed to so provide for him, and that plaintiff's services were worth \$5,000.) *Iowa*.—*Wernli v. Collins*, 87 Ia., 548; s. c. 54 N. W. Rep., 365. (Where plaintiff sues on express contract for services rendered, he cannot recover on *quantum meruit*.) *Maryland*.—*Fairfax, etc., Manuf. Co. v. Chambers*, 75 Md., 604; s. c. 23 Atl. Rep., 1024. (Under the common counts, plaintiff may give evidence of value of services, though it appears that the services were performed under a special contract. In such a case, however, it is the usual practice to join with the common counts a special count on the contract.) *Massachusetts*.—*Paige v. Barrett*, 151 Mass., 67; s. c. 23 N. E. Rep., 725. (In an action for wrongful discharge, it is not a material defect for the declaration to conclude "wherefore, defendants owe him * * * the amount of his wages.") *Michigan*.—*Wyatt v. Herring*, 90 Mich., 581; s. c. 51 N. W. Rep., 684. (Where there are both the common counts and a special count on the contract, if the evidence only supports the special count, and fails to show the value of the services, recovery cannot be had on the common counts.) *Mississippi*.—*Gibson-Moore Manuf. Co. v. Meek*, 71 Miss., 614; s. c. 15 So. Rep., 789. (Under the new procedure, a declaration alleging that plaintiff hired defendant for one year at \$10 a week; that without any fault on his part he was discharged; and that defendant was indebted to him for the time he contracted at \$10 a week, is sufficient as against demurrer, or after verdict.) *Missouri*.—*Glover v. Henderson*, 120 Mo., 367; s. c. 25 S. W. Rep., 175. (In an action for wrongful discharge, petition set out the contract, averred a wrongful discharge, and the value of the services rendered. *Held*, that the action was for *quantum meruit*, and not for damages for breach of contract.) *Ryors v. Prior*, 81 Mo. App., 555. (In an action for attorney's fees, a petition which sets out the services rendered, states the value, and charges that the plaintiff refused to pay, is not open to the objection that it does not allege that the account is due.) *Nebraska*.—*Small v. Poffenbarger*, 32 Neb., 234; s. c. 49 N. W. Rep., 337. (Complaint alleging that there is due from plaintiff for work and labor done and performed by defendant at plaintiff's request in years specified, a certain sum of money, no part of which has been paid, should not be dismissed for failing to state a cause of action, though it does not state the value of the services or plaintiff's promise to pay therefor.) *Imhoff v. House*, 36 Neb., 28; s. c. 53 N. W. Rep., 1032. (Where complaint in an action for services seeks to recover on *quantum meruit*, evidence of a contract for a fixed amount is inadmissible.) *New York*.—*Meissner v. Brennan*, 39 State Rep., 443; s. c. 15 N. Y. Supp., 671; 21 Civ. Pro. R., 36. (An allegation of the value of the services rendered is admitted, if not denied, but if the agreed compensation and value are both alleged, the action will be regarded as on the express contract, and defendant need not deny the allegation as to value.) *Foley v. Mail & Exp. Pub. Co.*, 8 Misc., 91; s. c. 28 N. Y. Supp., 778. (Where employment was

for a given time, if services were satisfactory, an allegation that plaintiff was discharged "without any reasonable cause whatever" is sufficient on demurrer.) *Fuld v. Kahn*, 4 Misc., 600; 54 State Rep., 184; 24 N. Y. Supp., 558. (In an action for the agreed compensation, on failure to prove the express contract, defendant cannot recover the value of the services without amendment.) *American Encaustic Tiling Co. v. Reich*, 84 State Rep., 64; s. c. 11 N. Y. Supp., 776; *aff'd* in 85 State Rep., 579; 12 N. Y. Supp., 927. (Plaintiff may claim both the agreed compensation and the value of his services, and will not be required to elect between them at the trial.) *Miller v. Schumann*, 19 N. Y. Supp., 213. (Complaint alleging that plaintiff agreed to pay defendant for services in putting them in communication with manufacturers, "so that" that they might procure agencies for the manufacturer's goods, dismissed for failing to allege that defendants did procure the agencies.) *Griffin v. Jackson*, 36 State Rep., 110; s. c. 13 N. Y. Supp., 321. (To sustain a judgment by default in the justice's court, a complaint alleging "that the plaintiffs are indebted to defendant in the sum of \$13.25, being for balance due to him from plaintiffs for work and labor done and performed at their request," etc., sufficiently shows that the debt was payable.) *Tracy v. Tracy*, 59 Hun, 1; s. c. 35 State Rep., 67; 12 N. Y. Supp., 665. (In an action for services, complaint must allege that defendant has not been paid for his services, but a count alleging that "plaintiff is indebted to this defendant," followed by the particulars of the indebtedness, is sufficient.) *North Carolina*.—*Stokes v. Taylor*, 104 N. C., 394; s. c. 10 S. E. Rep., 566. (Under a complaint alleging that defendant is indebted to plaintiff for \$1,440 "for services performed as a clerk in defendant's store at \$20 per month," giving period of employment, plaintiff may prove services either under special contract or on *quantum meruit*.) *S. P., Roberts v. P. A. Demens Wood Working Co.*, 111 N. C., 432; s. c. 16 S. E. Rep., 415; *Fulks v. Mack*, 108 N. C., 601; s. c. 13 S. E. Rep., 92. *South Dakota*.—*Busta v. Wardall*, 8 S. D., 248; s. c. 52 N. W. Rep., 418. (Complaint alleging that defendant is indebted to plaintiff in the sum of \$200 for work and labor performed by him for defendant during the year 1888, at defendant's request, for which work and labor said defendant agreed to pay plaintiff the sum of \$200, but has not paid said sum or any part thereof, is sufficient to sustain a judgment by default, though it would have been subject to a motion to be made more definite and certain.) *Wisconsin*.—*Beers v. Kuehn*, 84 Wis., 33; s. c. 54 N. W. Rep., 109. (Where plaintiff counts on the express contract and also for the reasonable value of the work, but blends the two causes of action by asking judgment as if but one was stated, defendant having gone to trial without objection, and the evidence as to the express contract being conflicting, it is error to charge that the plaintiff cannot recover on a *quantum meruit*.) *Waterman v. Waterman*, 81 Wis., 17; s. c. 50 N. W. Rep., 668. (Plaintiff may count on both *quantum meruit* and express contract.) *La Coursier v. Russell*, 82 Wis., 265; s. c. 52 N. W. Rep., 176. (One wrongfully discharged may bring an action upon the contract for an instalment of wages or the proportion thereof due at the time of the discharge, and is not obliged to resort to a *quantum meruit*.)

COMPLAINTS IN ACTIONS ON BILLS, NOTES, CHECKS, ETC.

[Principal Case, p. 58, this Vol.]

- (1) *Execution or indorsement by defendant.*
- (2) *The note, etc.; its contents, etc.*
- (3) *Consideration.*
- (4) *Maturity.*
- (5) *Plaintiff's ownership.*
- (6) *Acceptance, presentment, protest, notice, etc.*
- (7) *Non-payment.*

(1) *Execution or indorsement by defendant.*

California.—*Smith v. Waite*, 108 Cal., 372; s. c. 37 Pac. Rep., 232. (Delivery imported from allegation that defendant "duly made" note and setting out copy thereof.) *Goetz v. Goldbaum*, Cal., 1894, 37 Pac. Rep., 646. (Where copy of note set forth in complaint purported to be signed by defendant "per Wm. G.," *Held*, that complaint was not demurrable for failing to allege who Wm. G. was, or his authority to act for defendant.) *Connecticut*.—*Lord v. Russell*, 64 Conn., 86; 29 Atl. Rep., 242. (Allegation that defendant by his note promised to pay plaintiff a specified sum, at a place and time stated; that the note is now the property of plaintiff, and making a copy of the note a part of the pleading, sufficiently shows execution and delivery of note.) *Salomon v. Hopkins*, 61 Conn., 47; s. c. 28 Atl. Rep., 716. (Where complaint alleged a promise by three defendants to pay the notes sued on, and a copy of the note which formed a part of the pleading was signed by "A. J. & J. H. Hopkins," *held*, that evidence was admissible to show that the third defendant, J. M. Hopkins, adopted the signature.) *Idaho*.—*Elbring v. Mullen*, Idaho, 1894, 38 Pac. Rep., 404. (Complaint alleging that defendant made and delivered note, and setting out a copy, sufficiently shows execution and delivery thereof.) *Rams v. Bohm*, Ind. App., 1893, 33 N. E. Rep., 218. (Complaint alleging defendants were partners doing business under a firm name, and setting out a copy of a note signed with the firm name, sufficiently connects defendants with the note and shows that it was executed by them as partners.) *Bell v. Mansfield*, Ky., 1890, 13 S. W. Rep., 838. (Allegation that defendant by his promissory note herewith filed, agreed and promised to pay, etc., sufficiently shows execution and delivery of the note.) *Massachusetts*.—*Foster v. Leach*, 160 Mass., 418; s. c. 36 N. E. Rep., 69. (In an action against indorsers, a declaration alleging a separate contract of indorsement, will not be regarded as charging a joint liability because it concludes with an averment that defendants owe plaintiff the amount of the note.) *Missouri*.—*First National Bank v. Landis*, 34 Mo. App., 433. (Allegation that defendant, A., made his promissory note to the order of plaintiff, and that the defendant, B., indorsed the same and thereby became a maker of the note with A., is

sufficient to charge both A. and B. with the payment of the note, though at common law an express allegation of a promise to pay on the part of both defendants would have been necessary.) *Montana*.—Schuttler v. King, 18 Mont., 226; s. c. 33 Pac. Rep., 938. (Complaint alleging the execution and delivery of a note by defendant to plaintiff for a specified sum, etc., is not bad on demurrer because it fails to expressly allege that defendant promised to pay plaintiff the amount of the note.) *New York*.—Casco Nat'l Bank v. Clark, 139 N. Y., 307. (An action may be maintained against persons signing a note, individually, though the words "prest." and "treas." are placed after their signatures respectively, and a corporate name is printed on the margin of the note, if plaintiff purchased the note without knowledge that it was only intended to bind the corporation.) S. P., Sykes v. Temple, 69 Hun, 448. Hand v. Society for Savings, 44 State Rep., 785; s. c. 18 N. Y. Supp., 157. (Under a complaint alleging the making of the contract by the defendant corporation, and setting forth a copy of a note signed by "S. H. M., Prest.," evidence is admissible to show that the person who signed the note was president of the defendant, and that he was authorized to execute it in its behalf.) First National Bank of Oxford v. Turner, 24 N. Y. Supp., 793. (Complaint held bad on demurrer, which alleged that C. T. was agent of defendant, and as such agent made "his" promissory note, and setting out a note signed by "C. T., Agt.") Vogle v. Kirby, 15 Civ. Pro. R., 332; s. c. 4 N. Y. Supp., 99; 18 State Rep., 287. (Complaint is bad on demurrer, which alleges that the action is brought on an instrument for the payment of money only and setting forth a copy, without alleging that it was made by defendant.) Edison General Electric Co. v. Zebbley, 72 Hun, 166; s. c. 55 State Rep., 63; 25 N. Y. Supp., 389. (In an action by payee to charge one who indorsed the note with liability thereon, facts must be alleged to overcome the presumption that defendant is the second indorser; and see S. P., Jaffray v. Krauss, 79 Hun, 449; s. c. 61 State Rep., 254; 29 N. Y. Supp., 967; Smith v. Storm, 6 Misc., 627; s. c. 58 State Rep., 573; 27 N. Y. Supp., 143; McPhillips v. Jones, 26 N. Y. Supp., 101; N. Y. Security & Trust Co. v. Storm, 81 Hun, 33; s. c. 62 State Rep., 539; 30 N. Y. Supp., 605. *Oregon*.—Deering v. Creighton, 19 Ore., 118; s. c. 24 Pac. Rep., 198. (Where it is sought to charge an indorser as a joint maker the complaint must state facts to show his liability as such.) *South Carolina*.—Watson v. Barr, 37 S. C., 463; s. c. 16 S. E. Rep., 188. (Complaint held sufficient to charge both defendants as makers of the non-negotiable instrument sued on, which alleged that the instrument was executed by both defendants and delivered to plaintiffs, and sets forth a copy of the instrument which appears to be subscribed by one of the defendants and indorsed by the other.) *South Dakota*.—Scott v. Esterbooks, S. D., 1894, 60 N. W. Rep., 850. (Form of complaint setting forth a copy of note approved.) *Texas*.—Behrens v. Dignawity, 4 Tex. Civ. App., 201; s. c. 23 S. W. Rep., 288. (Execution of note sufficiently averred, in absence of exception, where it was alleged that defendant was indebted to plaintiff in a specified sum according to the terms of a promissory note, setting out a copy.)

(2) *The note, etc.; its contents, etc.*

California.—Ward v. Clay, 82 Cal., 502; s. c. 23 Pac. Rep., 50. (Note annexed as an exhibit cannot be considered on demurrer in support of the complaint.) Brown v. Weldon, 71 Cal., 398; s. c. 12 Pac. Rep., 280. (Where the note is set out, an allegation of defendant's promise to pay is unnecessary.) *Colorado*.—Salazar v. Taylor, 18 Colo., 588; s. c. 33 Pac. Rep., 369. (Allegation of promise by defendant under his hand is equivalent to an allegation of a promise in writing.) *Georgia*.—Simpson v. Earle, 87 Ga., 215; s. c. 13 S. E. Rep., 446. (Though it appears on the face of the note set forth that it was given for rent, it is not necessary to allege that the relation of landlord and tenant existed.) *Indiana*.—Jaqua v. Woodbury, 3 Ind. App., 289; s. c. 29 N. E. Rep., 573. (Failure to aver that the note was made payable to plaintiff is immaterial, where the note is made a part of the complaint.) Blackwell v. Pendergast, 182 Ind., 550; s. c. 32 N. E. Rep., 319. (Complaint falsely alleging that a copy of note has been filed is bad on demurrer.) Gish v. Gish, 7 Ind. App., 704; s. c. 34 N. E. Rep., 305. (Reference to a copy of the note is sufficient, where after describing the note it is alleged that a copy is herewith filed, and the allegation is immediately followed by a copy of the note marked as an exhibit.) *Maryland*.—McCann v. Preston, 77 Md., 80; s. c. 28 Atl. Rep., 1102. (Note admissible in evidence under a common count for money lent.) *Massachusetts*.—Burr v. Jay, 151 Mass., 295; s. c. 23 N. E. Rep., 838. (A declaration on a written promise to pay a sum of money need not set forth an indorsement thereon acknowledging that plaintiff had received a bond as collateral security.) *Michigan*.—Shaw v. Fortine, 98 Mich., 254; s. c. 57 N. W. Rep., 128. (How. Ann. Stat., § 6871, providing that in actions on promissory notes, in shall be sufficient in the declaration to designate any person named in the note by the same initials as used therein, applies to a payee in an action by him.) *Minnesota*.—Almach v. Downey, 45 Minn., 460; s. c., 48 N. W. Rep., 197. (Mistake in the date of note should be set out in pleading, but where evidence thereof is received without objection in absence of such allegation, the pleading may be amended.) *Missouri*.—Barrows v. Million, 43 Mo. App., 79. (Allegation of note payable to plaintiff or order, and proof of a note payable to plaintiff or bearer, held an immaterial variance.) *Nebraska*.—Barnes v. Van Keuren, 31 Neb., 165; s. c. 47 N. W. Rep., 848. (Where note is pleaded by setting forth a copy, it is not necessary to attach a copy thereof to the pleading as an exhibit.) *New York*.—Denick v. Hubbard, 36 Hun, 188. (Held, no variance, though the proof showed that the note sued on was ante-dated.) *Oklahoma*.—First National Bank of Arkansas City v. Jones, Okla., 1895, 37 Pac. Rep., 824. (Demurrer sustained for variance between the pleading and the note filed as an exhibit.) *Oregon*.—Sperry v. Lewis, 19 Ore., 250; 23 Pac. Rep., 961. (Though a contract is written on the same paper as the note sued on, by which the maker agrees to deliver his wool clip for a year to payee as security for the note with a provision that the payee should sell the wool on commission, complaint need not allege that defendant failed to deliver the wool, or that it was insufficient to pay the debt.) *United*

States.—*Drake v. Found Treasure Min. Co.*, 53 Fed. Rep., 474. (Complaint on a note may be amended so as to change date, amount, time of payment, or names of parties, provided the identity of the note sued on is preserved.) *Washington.*—*Singer Manuf. Co. v. Hatley*, 3 Wash. Tr., 198; s. c. 21 Pac. Rep., 384. (In an action on a note given for the purchase money of a machine, and containing a stipulation that the machine should remain the property of the plaintiff until the note was paid, the complaint is sufficient if it sets forth a copy of the note, and alleges the sale and delivery of the machine in consideration thereof, and its acceptance and retention by defendant, and his refusal to pay the note.)

(3) *Consideration.*

California.—*Poirier v. Gravel*, 88 Cal., 79; s. c. 25 Pac. Rep., 962. (In an action on a note or other written instrument, it is unnecessary to aver consideration.) *Indiana.*—*Petree v. Fielder*, 3 Ind. App., 127; s. c. 29 N. E. Rep., 271. (Complaint is not demurrable for failure to allege consideration, if the note set forth by its terms states that it was for value received.) *Maine.*—*Bartlett v. Leathers*, 84 Me., 241; s. c. 24 Atl. Rep., 842. (Defendant's indorsement of note to plaintiff for value is sufficiently averred by an allegation that defendant became liable, and in consideration thereof promised to pay plaintiff the note.) *Minnesota.*—*Elmquist v. Markoe*, 39 Minn., 494; s. c. 40 N. W. Rep., 825. (Consideration is sufficiently pleaded, if the copy of the note set out is in terms for value received.) *New York.*—*Mt. Morris Bank v. Lawson*, 7 Misc., 228; s. c. 27 N. Y. Supp., 272. (Where the note set out in complaint states that it was given for a valuable consideration no allegation of consideration is necessary.) *Guggenheim v. Goldberger*, 58 State Rep., 34; s. c. 27 N. Y. Supp., 422. (In an action by indorsee against the maker and indorser of a check, defendant's failure to deny the allegation in the complaint that the check was transferred to plaintiff for value is not an admission thereof, as such averment is unnecessary in the complaint.) *Beaudrias v. Walck*, 17 N. Y. Supp., 716; s. c. 45 State Rep., 7. (Where the notes set out in complaint state that they were given in consideration of certain articles the title of which should not pass to the maker until the notes were paid, but in no way abridging the rights of payee, *held*, that it was not necessary for plaintiff to allege the sale and delivery of the article referred to in notes.) *West Virginia.*—*McClain v. Lowther*, 35 W. Va., 297; s. c. 13 S. E. Rep., 1003. (In an action between payee and drawer of a check, *held*, that the giving of the check implied an indebtedness, and consideration need not be pleaded.)

(4) *Maturity.*

Alabama.—*Freider v. Leinkauff*, 92 Ala., 469; s. c. 8 So. Rep., 758. (Allegation that plaintiffs previous to suit offered to discount the note, and that defendant accepted the offer, is insufficient to show that the date of maturity was changed.) *Indiana.*—*Taylor v. Hearn*, 181 Ind., 537; s. c. 31 N. E. Rep., 201. (If the note filed as an exhibit with the complaint appears to have been passed due when the suit was brought, an express

allegation that the note is due is unnecessary); *S. P. Postel v. Ord*, 1 Ind. App., 252; s. c. 27 N. E. Rep., 584. *South Carolina*.—*Stoddard v. Hill*, 88 S. C., 385; s. c. 17 S. E. Rep., 138. (Maturity of note sufficiently alleged by an averment that the balance due thereon is "past due and unpaid.") *Texas*.—*Grabam v. Miller*, Tex. Civ. App., 1894, 24 S. W. Rep., 1107. (Where the only thing necessary to make the note due is the holder's election that it should mature, an averment, that plaintiff has demanded payment, is a sufficient averment, in absence of special exception, of notice of plaintiff's election, and that the debt is due.)

(5) *Plaintiff's ownership.*

California.—*Bank of Shasta v. Boyd*, 99 Cal., 604; s. c. 34 Pac. Rep., 337. (In an action by the payee of a note, an allegation that plaintiff is the owner thereof is unnecessary and a denial of such allegation raises no issue.) *Eames v. Crosier*, 101 Cal., 260; s. c. 35 Pac. Rep., 873. (Allegation that plaintiff is the owner and holder of note, and that the payee thereof, for value, and before maturity, assigned it by an endorsement in blank, sufficiently shows plaintiff's title.) *Pryce v. Jorden*, 69 Cal., 569; s. c. 11 Pac. Rep., 185. (In an action by an indorsee, plaintiff's ownership of the note at the commencement of the action is sufficiently pleaded by an allegation that payee "indorsed, assigned and delivered the note to plaintiff," and that no part of the same has been paid.) *Illinois*.—*Rozet v. Harvey*, 26 Ill. App., 558. (Declaration in an action by payee against the maker of a note need not set out a blank indorsement by plaintiff.) *Indiana*.—*Brotherton v. Street*, 124 Ind., 599; s. c. 24 N. E. Rep., 1068. (Demurrer to complaint sustained, where the copy of the note set forth shows an indorsement from which it appears that the title of the note is in a person other than the plaintiff.) *Bascom v. Toner*, 5 Ind. App., 229; s. c. 31 N. E. Rep., 856. (In an action by an indorsee against the maker of a note, a copy of the indorsement need not be set out with the copy of the note; since in such a case the note, and not the indorsement, is the contract sued on, the indorsement being merely the manner of acquisition.) *Michigan*.—*Bitzer v. Wagar*, 88 Mich., 238; s. c. 47 N. W. Rep., 210. (In an action on a note payable to bearer it is unnecessary to allege a transfer by payee to plaintiff.) *New York*.—*Pearl v. Raduziner*, 10 Misc., 45; s. c. 62 State Rep., 771; 30 N. Y. Supp., 810. (In an action by payee of note, a transfer thereof by him and a retransfer to him need not be alleged.) *Oishei v. Craven*, 11 Misc., 189; s. c. 81 N. Y. Supp., 1021. (It is sufficient, in an action against maker, to generally allege that the note was assigned, delivered, transferred and indorsed to plaintiff, without specifically alleging that it was indorsed by payee.) *Washington*.—*Davis v. Erickson*, 8 Wash., 654; s. c. 29 Pac. Rep., 86. (Complaint alleging that plaintiff assigned the note sued on as security for a debt, and that the assignee refused to bring an action thereon, states no cause of action.) *Wisconsin*.—*Geilfuss v. Gates*, 87 Wis., 895; s. c. 58 N. W. Rep., 742. (Complaint sufficiently shows plaintiff's ownership of the note, which alleges the assignment of all the property of a bank to plaintiff as assignee for the benefit of its creditors, and that he is the lawful owner and holder of the note.)

(6) *Acceptance, presentment, protest, notice, etc.*

Arkansas.—*Wards v. Sparks*, 53 Ark., 519; s. c. 14 S. W. Rep., 898. (Allegation that bill was protested for non-payment, without more, imports all necessary steps to fix the liability of drawer or indorser.) *Illinois*.—*Hart v. Otis*, 41 Ill. App., 431. (In an action upon a foreign bill, protest, or some excuse for the omission thereof, should be alleged, but the objection to a declaration omitting such allegation cannot be reached by a general demurrer.) *Indiana*.—*Brown v. Jones*, 125 Ind., 375; s. c. 25 N. E. Rep., 452. (In an action against the drawer and indorser of a bill, the acceptance thereof not being the foundation of the action, a copy of it need not be filed with the complaint, and if filed cannot control the averments.) *Offutt v. Rucker*, Ind. App., 1891; 27 N. E. Rep., 589. (In an action against drawer, it is sufficient to allege that the check was duly presented and payment refused; it is unnecessary to allege the reason given for the bank's refusal to pay, or that drawer had no funds.) *Michigan*.—*Gooding v. Underwood*, 89 Mich., 187; s. c. 50 N. W. Rep., 818. (Under a declaration merely charging defendant with having accepted a bill on condition that the amount thereof should be found due from him to drawer, plaintiff cannot prove that defendant is estopped from denying the indebtedness to drawer.) *New York*.—*Jaffray v. Krauss*, 79 Hun, 449; s. c. 61 State Rep., 254; 29 N. Y. Supp., 987. (In action against indorser of a note, complaint dismissed for failure to allege presentment, demand and non-payment of note by maker, and notice thereof to defendant.) *Rawley v. National Bank of Deposit*, 68 Hun, 550; s. c. 45 State Rep., 331; 18 N. Y. Supp., 545. (In an action by a payee of a check against the bank on which it was drawn, complaint held demurrable for not alleging that plaintiff indorsed the check, or that defendant was bound to pay it.) *Hirschfelder v. Locey Mining, etc., Co.*, 42 State Rep., 108; s. c. 17 N. Y. Supp., 726. (In an action against the acceptor and drawer of a bill, notice to drawer of acceptor's non-payment held sufficiently pleaded, where complaint alleged presentment to both defendants and their refusal to pay.) *Alleman v. Bowen*, 39 State Rep., 822; 15 N. Y. Supp., 318. (Though the note was indorsed after its maturity, to charge the indorser thereon, notice to him of demand upon maker, and his refusal to pay must be alleged.) *Pennsylvania*.—*Penn. Natl. Bank v. Kopitzsch Soap Co.*, 161 Pa. St., 184; s. c. 28 Atl. Rep., 1077. (In an action by transferee against the drawer of a check, declaration held insufficient to require an affidavit of defense, which contained a copy of the check, and a common count for money paid, but did not allege plaintiff's title, presentment to drawer, his refusal to pay, nor the amount due from him to plaintiff.) *Utah*.—*Smith v. McEvoy*, 8 Utah, 58; s. c. 29 Pac. Rep., 1030. (In an action against an indorser of a note, an allegation that "he had due legal notice" of non-payment and dishonor thereof, held sufficient.)

(7) *Non-payment.*

California.—*Notman v. Green*, 90 Cal., 172; s. c. 27 Pac. Rep., 157. (Non-payment of the note sued on must be alleged); *S. P. Barney v. Vigoreaux*, 92 Cal., 331; s. c. 28 Pac. Rep., 678. *Wise v. Hogan*, 77 Cal., 184;

s. c. 19 Pac. Rep., 278. (In an action against the administrator of a deceased maker, an allegation of non-payment by deceased is enough.) *New York*.—Wright v. Deering, 2 Misc., 296; 50 State Rep., 328; 21 N. Y. Supp., 929. (Defect in complaint on a note in not alleging the makers non-payment or his indebtedness upon it, *held*, cured by evidence thereof received without objection.) See also Note to Lent v. N. Y. & Mass. Ry. Co., p. 475, this vol.

COMPLAINTS IN ACTIONS ON INSURANCE POLICIES.

[Principal Case, p. 94, this Vol.]

- (1) *Insurable interest.*
- (2) *The policy; its execution, contents, etc.*
- (3) *Performance of conditions.*
- (4) *Loss; its cause, amount, etc.*
- (5) *Non-payment.*

(1) *Insurable interest.*

Alabama.—Commercial Fire Ins. Co. v. Capital City Ins. Co., 91 Ala., 320; s. c. 8 So. Rep., 222. (Statutory form of complaint is sufficient without expressly alleging insurable interest.) *Indiana*.—Phoenix Ins. Co. v. Wilson, 132 Ind., 449; s. c. 25 N. E. Rep., 592. (After verdict, an allegation that plaintiff was owner of the property when destroyed, sufficiently alleges ownership in fee.) *Indiana*, etc., Ins. Co. v. Bogeman, 4 Ind. App., 237. (Complaint held to be insufficient on demurrer, in an action for livestock insurance, where plaintiff's ownership or interest in the insured animal at the time of its death was not alleged.) *Kansas*.—St. Paul, etc. Ins. Co. v. Kelly, 43 Kan., 741; s. c. 23 Pac. Rep., 1046. (Where it was alleged that plaintiff was the owner of the goods insured and destroyed by fire, and had an insurable interest therein. *Held*, that the words insurable interest were to be regarded on demurrer as surplusage, and not as claiming an interest less than ownership, not covered by the policy.) *Michigan*.—Ermentrout v. American Ins. Co., Mich., 1895, 62 N. W. Rep., 543. (Where policy provides that loss shall be payable to assignee of mortgage as interest may appear, complaint of a subsequent assignee is sufficient, which alleges an assignment to him of the former assignee's interest without specially alleging a mortgage, or the extent of such former assignee's interest.) *Oregon*.—Hardwick v. State Ins. Co., 20 Ore., 547; s. c. 26 Pac. Rep., 840. (Complaint is insufficient on demurrer, if plaintiff's insurable interest, both at the time of making the contract and at the time of loss, is not alleged.) *Texas*.—Commercial Union Assur. Co. v. Dunbar, Tex. Civ. App., 1894, 26 S. W. Rep. 628. (Demurrer sustained for a failure to allege that plaintiff had an insurable interest at the time of insurance and the time of loss.) *United States*.—Earnmoor v. California Ins. Co., 40 Fed. Rep., 847. (Libel on a policy of marine insurance should show an insurable interest in vessel at the time

when the policy purports to take effect.) *Kentucky Life & Acci. Ins. Co. v. Hamilton*, 63 Fed. Rep., 93. (An allegation that the policy in suit was not speculative, without expressly alleging that plaintiff had an insurable interest, is sufficient after verdict.) *Vermont*.—*Dickerman v. Vermont Mut. Fire Ins. Co.*, Vt., 1895, 30 Atl. Rep., 808. (Plaintiff's insurable interest at the time of making policy and time of loss, must be alleged.)

(2) *The policy ; its execution, contents, etc.*

California.—*Rebut v. Legion of the West*, 96 Cal., 661; s. c. 31 Pac. Rep., 1118. (In an action to recover an instalment of an endowment, it is insufficient to set forth the coupon therefor without the certificate to which it is attached and to which it refers.) *Himmeliien v. Supm. Council Am. Legion of Honor*, Cal., 1893, 33 Pac. Rep., 1190. (Complaint on a benefit certificate will not be dismissed for failing to set out the application for membership referred to in the certificate as being on file in the company's office.) *Stockton, etc., Works v. Glen Falls Ins. Co.*, 98 Cal., 557; s. c. 33 Pac. Rep., 633. (Complaint alleging the issuing of a fire policy, submission to arbitration and a promise by defendant to pay the award, will be regarded as setting forth a cause of action upon the award, and plaintiff cannot recover without proof that defendant agreed to the arbitration.) *Illinois*.—*Illinois, etc., Ins. Co. v. Baker*, 49 Ill. App., 92. (Declaration need not allege a waiver of the special limitation provided by the policy, but plaintiff may leave it to defendant to set up the limitation by special plea and plead the waiver by his reply.) *Phoenix Ins. Co. v. Stocks*, Ill., 1893, 36 N. E. Rep., 408. (The application for insurance is not a part of the contract that must be filed in an action on the policy.) *Indiana*.—*Indiana, etc., Ins. Co. v. Byrnett*, 9 Ind. App., 443; s. c. 36 N. E. Rep., 779. (Copy of application need not be set out with the policy.) *S. P. Phoenix Ins. Co. v. Stark*, 120 Ind., 444; s. c. 22 N. E. Rep., 413; *Continental Ins. Co. v. Dorman*, 125 Ind., 189; s. c. 25 N. E. Rep., 2139. (Complaint alleging that a premium note was accepted as absolute payment, where it appears that the policy provides that it shall only be accepted as payment at maturity—is bad.) *Michigan*.—*Knop v. National Fire Ins. Co.* 101 Mich., 359; s. c. 59 N. W. Rep., 653. (Evidence of household articles destroyed by fire, inadmissible, where bill of particulars furnished did not attempt to give any further information, but merely described them as "contents of house.") *Dove v. Royal Ins. Co.*, 98 Mich., 122; s. c. 57 N. W. Rep., 30. (Where declaration counts on policy for \$2,100, covering \$100 on a barn, a policy of \$1,800, covering *inter alia*, \$400 on a barn, is inadmissible in evidence.) *Connecticut Fire Ins. Co. v. Kinne*, 77 Mich., 231; s. c. 43 N. W. Rep., 871. (Declaration on an insurance policy cannot be amended to show an oral contract of insurance, and an agreement to deliver a policy in accordance therewith, and a delivery of a different policy by defendant's mistake or fraud.) *Missouri*.—*Heffernan v. Supm. Council, etc.*, 40 Mo. App., 605. (Where petition alleges an unconditional contract, it is not error to admit in evidence a contract containing conditions, if defendant has not been misled.) *New York*.—*Black v. Homeo-*

pathic Mut. Life Ins. Co., 47 Hun, 210. (Where the policy is set forth, its legal effect will be gathered from its terms, and not from the allegations of the complaint.) *Knarr v. N. Y. State, etc., Ass'n.*, 79 Hun, 83; s. c. 61 State Rep., 865; 29 N. Y. Supp., 508. (Complaint of administrator showed a policy payable to insured's wife, or in case she did not survive, to his administrator, *held*, that the complaint was insufficient in not alleging that the wife did not survive.) *North Carolina*.—*Britt v. Mutual Benefit Life Ins. Co.*, 105 N. C., 175; s. c. 10 S. E. Rep., 896. (Application for policy need not be set out in the complaint.) *South Dakota*.—*First Nat. Bk. v. Dakota, etc., Ins. Co.*, So. D., 1895, 61 N. W. Rep., 439. (Complaint stating that proofs of loss were made immediately after the fire, but neither stating nor showing on its face that 60 days thereafter have elapsed before suit—is insufficient.) *Texas*.—*Commercial Union Assur. Co. v. Dunbar*, Tex. Civ. App., 1894, 26 S. W. Rep., 628. (Complaint referring to policy, but not setting it forth or stating its terms, is bad on demurrer.) *United States*.—*Manhattan Life Ins. Co. v. Willis*, 8 C. C. A., 594; s. c. 60 Fed. Rep., 236. (For the purpose of admitting the policy in evidence, it is sufficient to describe it generally as a policy of insurance covenanting to pay assured, etc., a specified sum upon satisfactory proof of death during its continuance, without stating its other terms and conditions.) *Wisconsin*.—*Butternut Manuf. Co. v. Manufacturer's Mut. Ins. Co.*, 78 Wis., 202; s. c. 47 N. W. Rep., 363. (Where legal effect of the policy was sufficiently alleged, but the copy of the policy set forth inadvertently omitted the name of the insurance company, *held*, that the complaint was, nevertheless, sufficient.) *Shove v. Shove*, 79 Wis., 497; s. c. 48 N. W. Rep., 647. (Under an allegation that plaintiff is holder and owner of the life policy sued on, evidence may be given to show that he holds it as collateral security for a debt which has not been paid.) *Wyoming*.—*Hartford Fire Ins. Co. v. Kahn*, Wyo., 1893, 84 Pac. Rep., 895. (Complaint held good on demurrer, although it did not expressly allege the time during which the policy was to continue, or that it was in force at the time of loss.)

(3) *Performance of conditions.*

California.—*Richards v. Travelers' Ins. Co.*, 89 Cal., 170; s. c. 26 Pac. Rep., 762. (Notice and proof of loss sufficiently alleged by averments that more than 90 days (the time provided by policy) had elapsed prior to the commencement of the action after proof of loss, and that plaintiffs have duly complied with all of the conditions of the policy to be performed by them.) S. P.; *Emery v. Svea Fire Ins. Co.*, 88 Cal., 300; s. c. 26 Pac. Rep., 88. *Colorado*.—*California Ins. Co.*, 15 Colo., 70; s. c. 24 Pac. Rep., 577. (Amendment of complaint at trial so as to allege waiver of the condition that the policy should not be payable until 60 days after proof of loss, does not change the cause of action.) *Indiana*.—*Phoenix Ins. Co. v. Golden*, 121 Ind., 524; s. c. 23 N. E. Rep., 508. (Performance of a condition against the insured building becoming vacant or unoccupied, if it can be regarded as a condition precedent, is sufficiently alleged by averment of performance of every act which by the terms

of said policy plaintiff was required to do.) *Germania Life Ins. Co., v. Lunkenheimer*, 127 Ind., 536; s. c. 26 N. E. Rep., 1062. (In setting up an estoppel from acts of company's agent, it need not be alleged that its charter contained nothing to prevent the agent's acts from binding the company, though the application for insurance refers to the charter.) *Phoenix Ins. Co. v. Pickel*, 3 Ind. App., 333; s. c. 29 N. E. Rep., 432. (Allegation that plaintiff did not immediately notify defendant of loss "because defendant waived notice and proof thereof in the manner following, to wit: said defendant had actual knowledge thereof and notified and told plaintiff that it would not pay said loss, or any part thereof, and that he need not give such notice in writing or make said proof,"—is sufficient, though it does not expressly show that the waiver occurred before forfeiture of the policy.) *Supreme Council, etc., v. Forsinger*, 125 Ind., 52; s. c. 25 N. E. Rep., 129. (Where the performance of all conditions is alleged, it need not also be alleged that the proofs of disablement were satisfactory to the officers of the society, though the contract provides that they should be.) *Iowa*.—*Jones v. U. S. Mut. Acci. Ass'n., Ia.*, 1895, 61 N. W. Rep., 485. (In an action upon an accident policy it is not necessary for plaintiff to allege that the insured was not under the influence of liquor when the accident happened, though the policy provides that compliance by insured with the conditions of policy is a condition precedent to its enforcement.) *Kansas*.—*Gillett v. Burlington Ins. Co.*, 53 Kan., 108; s. c. 86 Pac. Rep., 52. (Under an allegation of performance of conditions, plaintiff cannot give evidence of defendant's waiver of a condition.) *Capital Ins. Co. v. Bank of Pleasanton*, 48 Kan., 397; s. c. 29 Pac. Rep., 578. (Under an allegation that plaintiff "made out and delivered to the insurance company proofs of loss in regular form as required by the policy," and performed all the conditions, and that the company denied all liability, a letter of the company may be given in evidence acknowledging the proofs of loss and refusing to pay the policy, but making no objections to the form of the proofs.) *Michigan*.—*Coryeon v. Providence Wash., Ins. Co.*, 79 Mich., 187; s. c. 44 N. W. Rep., 431. (Under an allegation that proofs of loss were forwarded to defendant's office in C., evidence that at a prior time proofs were also forwarded to its office in P. is inadmissible.) *Minnesota*.—*Mosness v. German Amer. Ins. Co.*, 50 Minn., 341; s. c. 52 N. W. Rep., 932. (Where complaint sets forth a policy containing a provision for arbitration in case of dispute as to the amount of loss, and alleges facts to show that such a dispute has arisen, it should be dismissed, if it fails to allege an arbitration and award, though it alleges in the short form the performance of all conditions.) *Missouri*.—*McCullough v. Phoenix Ins. Co., Mo.*, 1893, 23 S. W. Rep., 207. (Under a general allegation of performance of all the conditions in a policy of insurance, though otherwise in case of other contracts, plaintiff may prove a waiver of a condition by defendant.) *Nebraska*.—*Burlington Ins. Co. v. Campbell*, Neb., 1894, 60 N. W. Rep., 599. (Plaintiff must plead waiver of the condition as to location of property, in order to render it available.) *S. P. Phoenix Ins. Co. v. Bachelder*, 32 Neb., 490; s. c. 49 N. W. Rep., 217. *New York*.—*DeFrece v. National Life Ins. Co.*, 19 N. Y. Supp., 8. (Under an allegation that deceased "complied with the

terms of said agreement so far as the same were to be complied with by him," evidence of a waiver of a condition of the policy was admitted.) *Stewart v. Union Mut. Life Ins. Co.*, 68 Hun, 328; s. c. 43 State Rep., 805; 17 N. Y. Supp., 886. (To sustain complaint on demurrer, though it was not expressly alleged that the first premium had been paid in accordance with a condition in the policy that it should be paid on delivery, such fact may be inferred from an allegation that the policy had been duly executed and delivered.) *Heilner v. China Mut. Life Ins. Co.*, 18 N. Y. Supp., 177; s. c. 45 State Rep., 578. (Complaint dismissed for failing to allege the furnishing of proofs of loss in the time required.) *S. P. Furlong v. Agricultural Ins. Co.*, 28 Abb. N. C., 444; s. c. 45 State Rep., 856; 18 N. Y. Supp., 844. *Elmer v. Mutual Benef. Life Ass'n*, 19 N. Y. Supp., 289. (A denial of the allegation that all the conditions of the policy have been complied with by plaintiff, does not place the burden upon him of proving that each particular condition of the policy has been complied with.) *North Carolina*.—*Pioneer Manuf. Co. v. Phoenix Assur. Co.*, 110 N. C., 176; s. c. 14 S. E. Rep., 781. (At the trial plaintiff may prove a waiver of an incidental requirement of the policy by defendant, though plaintiff may not have pleaded it, or at least the Court may allow an appropriate amendment.) *Ohio*.—*Moody v. Insurance Co.*, Ohio, 1894, 38 N. E. Rep., 1011. (Plaintiff need not show as a condition precedent, the absence of a breach of condition that the premises should not be vacant without consent of the company.) *Tennessee*.—*London, etc., Ins. Co. v. Crunk*, 91 Tenn., 376; s. c. 23 S. W. Rep., 140. (Declaration need not aver performance or nonperformance of a condition subsequent, nor negative prohibited acts, or expected risks.) *Texas*.—*East Texas Fire Ins. Co. v. Brown*, 82 Tex., 631; s. c. 18 S. W. Rep., 718. (Plaintiff must plead waiver of conditions by defendant.) *Germania-Amer. Ins. Co. v. Waters*, Tex. Civ. App., 1895, 30 S. W. Rep., 576. (Petition to avoid an admitted breach of condition, must aver waiver thereof by defendant.) *Virginia*.—*Tilly v. Connecticut Fire Ins. Co.*, 86 Va., 811; s. c. 11 S. W. Rep., 120. (Where the policy is filed, and declaration alleges the performance of all conditions by plaintiff, the declaration is not demurrable because of failure to allege that there has been an award.) *Vermont*.—*Coolidge v. Continental Ins. Co.*, Vt., 1895, 30 Atl. Rep., 798. (Declaration need not set forth collateral provisions regarding the rights of the parties, liquidation of damages, etc.; noncompliance with these provisions being a matter of defence.) *Wisconsin*.—*Schwahn v. Michigan, etc., Ins. Co.*, Wis., 1894, 61 N. W. Rep., 78. (Where complaint alleges an agreement for renewal, and defendant's neglect to issue the same, and a loss within the time over which the renewal was to have extended, it is not demurrable for failing to allege performance by plaintiff of the conditions precedent in the original policy.)

(4) *Loss ; its cause, amount, etc.*

California.—*Richards v. Travelers' Ins. Co.*, 89 Cal., 170; 26 Pac. Rep., 762. (Where complaint in the language of the policy, alleged that deceased sustained bodily injury through external, violent and accidental

means, *held*, that the objection that the particular circumstances of the accident were not stated could not be raised by general demurrer.) *Illinois*.—*Mutual Accident Association v. Tuggle*, 188 Ill., 428; s. c. 28 N. E. Rep., 1066. (A declaration on a policy providing that beneficiary shall receive the sum represented by the payment of \$2 by each member of a specified class of members of the association, which does not aver the number of members that compose such class, is bad upon a general demurrer.) *Indiana*.—*Louisville Underwriters v. Durland*, 123 Ind., 544; 24 N. E. Rep., 221. (In an action on a marine policy which provides that the company shall be liable for any loss by fire, except when caused by explosion of boiler, and except as limited by certain warranties contained in the the policy, it is sufficient if complaint allege that the loss was caused by fire not arising from the explosion of any boiler, and that the insured performed all the conditions of the contract on his part.) *Maine*.—*Hutchins v. Ford*, 82 Me., 363; 19 Atl. Rep., 832. (Marine policy admitted in evidence, though declaration thereon did not negative a limitation therein as to the amount of defendant's liability.) *Minnesota*.—*Maxcy v. N. H. Fire Insurance Co.*, 54 Minn., 272; s. c. 55 N. W. Rep., 1130. (Where mortgagee is plaintiff in an action upon a fire policy, an allegation that he has sustained loss and damage to a certain amount is a sufficient allegation as against a general demurrer, that the insured owner sustained loss and damage.) *Missouri*.—*Summers v. Home Insurance Co.*, 53 Mo. App., 521. (Plaintiff must aver and prove the amount of loss.) *New York*.—*Weltin v. Union Marine Insurance Co.*, 37 State Rep., 595; s. c. 13 N. Y. Supp., 700. (Complaint on a marine policy is insufficient on demurrer if it fails to allege that the policy covered the precise loss by fire and water, or that when the loss occurred that the policy was still binding.) *Myers v. United Life Insurance Co.*, 42 State Rep., 121; s. c. 17 N. Y. Supp., 727. (In an action upon a life policy on the assessment plan, complaint is insufficient, if it fails to allege that defendant realized, or could have realized, the sum claimed by plaintiff from an assessment.) *Texas*.—*Alamo Fire Insurance Co. v. Shacklett*, Tex. Civ. App., 1894, 26 S. W. Rep., 630. (Petition demurrable for failing to allege that the fire did not occur from any of the causes excepted in the policy.) *S. P. Pelican Fire Ins. Co. v. Troy Co-op. Ass'n*, 77 Tex., 225; s. c. 13 S. W. Rep., 980; *Phoenix Insurance Co. v. Boren*, 83 Tex., 97; s. c. 18 S. W. Rep., 484; compare *Burlington Insurance Co. v. Rivers*, Tex., Civ. App., 1895, 28 S. W. Rep., 458. *United States*.—*Western Refrigerator Co. v. American Casualty Insurance, etc., Co.*, 51 Fed. Rep., 155. (Where policy insured "against all direct loss or damage, excepting all losses caused directly or indirectly by fire or lightning," declaration thereon is demurrable, if it does not negative the fact that the fire was caused by any of the excepted causes.) *Washington*.—*Coats v. West Coast, etc., Insurance Co.*, 4 Wash. 375; s. c. 30 Pac. Rep., 404. (Where policy provides that defendant's liability shall be proportioned to other insurance, a complaint thereon is defective if it fails to state what other insurance was on the property.)

(5) *Non-payment.*

California.—*Richards v. Travelers' Insurance Co.*, 80 Cal., 505; 23 Pac. Rep., 939. (Complaint upon an insurance policy which neither alleges non-payment, nor anything from which it can be inferred, is bad on demurrer.) *Nebraska.*—*Hanover Fire Insurance Co. v. Schellak*, 35 Neb., 701; s. c. 53 N. W. Rep., 605. (Complaint need not plead non-payment of losses; payment is a matter of defence.) *New York.*—*Gill v. Aetna Live Stock Insurance Co.*, 81 N. Y. Supp., 485. (Complaint upon an insurance policy dismissed because it failed to allege defendant had defaulted in payment.)

As to the necessity of pleading non-payment in actions upon contracts, see note on p. 475, this vol.

COMPLAINTS IN ACTIONS AGAINST TELEGRAPH COMPANIES FOR DERELICTION OF DUTY IN THE TRANSMISSION OF MESSAGES.

[Principal Case, p. 110, this Vol.]

Alabama.—*American Union Tel. Co. v. Dougherty*, 89 Ala., 191; s. c. 7 So. Rep., 660. (In an action for delay in delivering a message signed by plaintiff's brokers, so that the title of the contract closed by the message was in them, it is proper to allow amendment so as to make it a suit by the brokers to plaintiff's use.) *Western Union Tel. Co. v. Wilson*, 93 Ala., 82; s. c. 9 So. Rep., 414. (In action by receiver, complaint held sufficient which alleged, that defendant was engaged in the telegraph business; that the sender as plaintiff's agent delivered the message to defendant and paid therefor; and that defendant transmitted the message, but failed to deliver it to the plaintiff until the next day.) *Florida.*—*International Ocean Tel. Co. v. Saunders*, 32 Fla., 434; s. c. 14 So. Rep., 148. (A person for whose benefit a message is sent, and whose interest therein appears from the message itself, may maintain an action for damages caused by a delay in the delivery thereof.) *South Florida Tel. Co. v. Maloney*, Fla., 1894, 16 So. Rep., 280. (In an action against a telegraph company for refusing to transmit a message, declaration held insufficient for not alleging facts to show that the company's refusal was wilful and wrongful.) *Georgia.*—*Grenberg v. Western Union Tel. Co.*, 89 Ga., 754; 15 S. E. Rep., 651. (In an action for failure to send message, complaint held bad on demurrer for not alleging that defendant had an office at the place from which the message was alleged to have been sent, or anything to show that it had been received by defendant for transmission, or that anything had been paid therefor.) *Indiana.*—*Western Union Tel. Co. v. Eskridge*, 7 Ind. App., 208; s. c. 33 N. E. Rep., 238. (In an action for a failure to promptly deliver a message informing plaintiff of her mother's dying condition, complaint alleging that defendant's neglect prevented plaintiff from going to her mother, and that if she had received it she could have done so, sufficiently shows plaintiff's intent and desire to go had she received the message.) *Bierhaus v. Western Union Tel. Co.*, 8

Ind. App., 568; s. c. 84 N. E. Rep., 581. (In an action against a telegraph company for its failure to promptly deliver a message, substantial injury is shown by an allegation, that by reason of the delay, plaintiff's debtor in the meantime converted his property into money and had fled from the State to parts unknown, and that plaintiff had thereby lost his debt, and had been prevented from collecting the same.) *Missouri*.—*Lee v. Western Union Tel. Co.*, 51 Mo. App., 375. (Complaint in a justice's court held, sufficient to support a judgment by default, which alleged that defendant negligently altered and changed the meaning of the message, although it did not set forth the true message or show how it was altered.) *North Carolina*.—*Sherrill v. Western Union Tel. Co.*, 109 N. C., 527; s. c. 14 S. E. Rep., 94. (Complaint is not demurrable because it does not allege that the claim for damages was presented to defendant in accordance with the stipulations on the blank upon which the message was written, although a copy of the stipulations are set forth.) *Pennsylvania*.—*Fergusson v. Anglo-Am. Tel. Co.*, 151 Pa. St., 211; s. c. 25 Atl. Rep., 40. (In an action for damages for failing to deliver a message directing the purchase of goods, if they could be purchased at a stated price and shipped by a particular steamer, the statement of claim is insufficient, if it fails to allege that if the message had been received the goods could have been purchased at the price named, and sent by the steamer indicated.) *United States*.—*Western Union Tel. Co. v. Wood*, 6 C. C. A., 432; s. c. 57 Fed. Rep., 471. (The person to whom a message is sent cannot recover for a failure to deliver it, where he is not a party to the contract to have it sent, and defendant was not informed that it was for his benefit.) *Texas*.—*Western Union Tel. Co. v. Fore*, Tex. Civ. App., 1894, 26 S. W. Rep., 783. (One who is neither the sender or the person addressed, nor in any way shown by the message itself to have an interest therein, cannot recover for delay in its transmission.) *Western Union Tel. Co. v. Forter*, Tex. Civ. App., 1894, 26 S. W. Rep., 866. (Petition in an action for delay in delivering a message announcing the sickness of a relative, is not defective for failing to allege the relationship of the parties, if the message itself discloses it.) *Martin v. Western Union Tel. Co.*, 1 Tex. Civ. App., 143; s. c. 20 S. W. Rep., 860. (Allegation that the message was delivered to a connecting company, and that such company received and delivered it, shows an implied contract between the sender and the connecting company.) *Western Union Tel. Co. v. Piner*, Tex. Civ. App., 1894, 29 S. W. Rep., 66. (A stipulation in the contract, under which the message is sent, that the telegraph company will not be liable for any damage unless a claim therefor is presented within the time specified, is a condition subsequent which need not be pleaded by plaintiff, but is a matter of defense.) *Western Union Tel. Co. v. Henry*, Tex. Civ. App., 1894, 27 S. W. Rep., 63. (An allegation that the message was delivered to and sent by defendant, but not averring any contract to send it, is insufficient.) *Western Union Tel. Co. v. Beringer*, 84 Tex., 38; s. c. 19 S. W. Rep., 336. (Complaint is not demurrable, which alleges the sending of the message by a third person, who paid for it, if it appear that the message was sent for plaintiff's benefit and that he accepted it.) *S. P. Martin v. Western Union Tel. Co.*, 1 Tex. Civ. App., 143; s. c. 20 S. W.

Rep., 860. *Erie Tel., etc., Co. v. Grimes*, 82 Tex., 89; s. c. 17 S. W. Rep., 831. (Allegations sufficient to show that defendant's neglect in delivering the message caused the damages claimed;) S. P., *Western Union Tel. Co. v. Lyman*, 3 Tex. Civ. App., 460; s. c. 22 S. W. Rep., 656; *Mitchell v. Western Union Tel. Co.*, 5 Tex. Civ. App., 527; s. c. 24 S. W. Rep., 550.

COMPLAINTS IN ACTIONS AGAINST COMMON CARRIERS FOR LOSS OR INJURY TO GOODS INTRUSTED TO THEM FOR TRANSPORTATION.

[Principal Case, p. 119, this Vol.]

Alabama.—*Louisville, etc., R. Co. v. Gerson*, 14 So. Rep., 878. (Complaint should aver that defendant is a common carrier, in an action to recover for damages for a failure to deliver safely the goods transported.) *Georgia*.—*Boaz v. Central R., etc., Co.*, 87 Ga., 463; s. c. 13 S. E. Rep., 711. (Where goods are shipped under a special contract varying the common law liability of the carrier, an action for loss or injury to the goods is properly brought on it, and not on the carrier's general liability.) *Indiana*.—*Pennsylvania Co. v. Clark*, 2 Ind. App., 146. (In Indiana by statute all railroad corporations are common carriers, and an allegation that defendant is such a corporation is equivalent to an allegation that it is a common carrier.) *Louisville, etc., R. Co. v. Widman*, 9 Ind. App., 190; s. c. 37 N. E. Rep., 554. (In an action on a bill of lading, which provided that the carrier should not be liable for loss or damage unless notified thereof within thirty days, complaint held bad on demurrer for not alleging the giving of such notice or the performance of conditions precedent.) *Evansville, etc., R. Co. v. Keith*, 8 Ind. App., 57; s. c. 35 N. E. Rep., 296. (In an action against a carrier for the loss of goods, plaintiff was held entitled to recover regardless of the proof as to the negligence alleged.) *Pittsburgh, etc., R. Co. v. Racer*, 5 Ind. App., 209. (Complaint alleging that defendant failed to furnish cars for the transportation of plaintiff's cattle on a certain day "though able to do so," held to sufficiently allege that the carrier had the facilities.) *Indianapolis, etc., Ry. Co. v. Forsyth*, 4 Ind. App., 326; s. c. 29 N. E. Rep., 1138. (Where a common carrier by contract limits his liability to damages caused by negligence, the shipper must sue on the contract, and the burden of showing the carrier's negligence is on him.) *Missouri*.—*Davis v. Jacksonville S. E. Line, Mo.*, 1894, 28 S. W. Rep., 965. (Defendant's obligation to transport goods through to L., their final destination, was held sufficiently pleaded, where it was alleged that the goods were delivered to defendant to be carried to E., and thence to be forwarded to plaintiff at L., and that defendant received the goods for said carriage and delivery, but failed to deliver them to plaintiff in good order.) *South Carolina*.—*Dunbar v. Port Royal, etc., R. Co.*, 36 S. C., 110; s. c. 15 S. E. Rep., 357. (In an action against a railroad company on a special contract to transport goods beyond its own line, it is sufficient to set forth the contract,

and it is not necessary to allege that defendant is a common carrier.) *Texas*.—Fort Worth, etc., *R. Co. v. McAnulty*, Tex. Civ. App., 1894, 26 S. W. Rep., 414. (A through contract held to be charged, where it was alleged that defendant was a carrier engaged in shipping cattle from points in Texas, by means of connecting lines to Chicago, and that defendant accepted plaintiff's cattle for shipment to Cairo and thence to Chicago for a specified compensation.)

ACTIONS FOR USE AND OCCUPATION.

[Principal Case, p. 133, this Vol.]

Alabama.—Grady *v.* Ibach, 94 Ala., 153; s. c. 10 So. Rep., 287. (Under Ala. Code, § 2715, authorizing such actions, where land is demised by deed, an action cannot be maintained by a *cestui que* trust on attaining majority against one who obtained possession under a lease from the trustees; as plaintiff did not lease the premises.) *Colorado*.—Hennessey *v.* Hong, 16 Colo., 460; s. c. 27 Pac. Rep., 1061. (Use and occupation cannot be maintained unless the relation of landlord and tenant exists.) Board of Com'ers Pitkin County *v.* Brown, Colo. App., 1894, 31 Pac. Rep., 525. (The action may be maintained against a tenant holding over.) *Illinois*.—Jacksonville, etc., *Ry. Co. v. Louisville, etc., R. Co.*, 150 Ill., 480; s. c. 37 N. E. Rep., 924. (The value of use and occupation of premises may be recovered under the common counts.) *Indiana*.—Indianapolis, etc., *Ry. Co. v. First Nat'l Bank*, 134 Ind., 127; s. c. 38 N. E. Rep., 679. (Complaint is demurrable, if it sets up use and occupation of the premises for less than a year without alleging any agreement as to payment of rent, or duration of term, or any custom in regard thereto; since the presumption is, in absence of such facts, that defendant is tenant from year to year with rent payable annually at the end of the year.) *Kansas*.—Bank of Sun City *v.* Neff, 50 Kan., 506; s. c. 31 Pac. Rep., 1054. (Bill of particulars sufficiently states a cause of action, which alleges that plaintiff owned a certain building; that defendant used and occupied the same for a specified period with plaintiff's permission; that the use and occupation of the same for the period named were reasonably worth a specified sum; that no part thereof had been paid except a stated amount, and that there is due plaintiff from defendant for such use and occupation a given sum.) *Massachusetts*.—Cook *v.* Medbery, 150 Mass., 499; s. c. 23 N. E. Rep., 225. (A promise to pay rent will not be implied, where it appears that defendant left goods upon plaintiff's premises with his consent, and that plaintiff knew that defendant refused to pay rent, though plaintiff did not assent to such refusal.) *Michigan*.—Beecher *v.* Duffield, 97 Mich., 423; s. c. 56 N. W. Rep., 777. (The action may be maintained on a lease under seal.) *New York*.—Gustaveson *v.* Otis, 57 State Rep., 797; s. c. 27 N. Y. Supp., 280. (Description of premises by streets required to be made more definite and certain.) *Oregon*.—Kiernan *v.* Terry, Ore., 1894, 38 Pac. Rep., 671. (It is sufficient to describe the premises in such a manner as to enable them to be located.) *United States*.—Lazarus *v.* Phelps, 152 U. S., 81; s. c. 14 Supm. Ct., 477. (In Texas, an owner who overstocks his own

land and allows his cattle to graze on adjoining unoccupied land, is liable to the adjoining owner for the rental value of the land so used.) *Texas*.—*Abbey v. Shiner*, 5 Tex. Civ. App., 287; s. c. 24 S. W. Rep., 91. (The action cannot be maintained against one who allowed his cattle to graze on the uninclosed land of plaintiff.) *Nolan v. Mendere*, 77 Tex., 565, s. c. 14 S. W. Rep., 167. (An owner using a wall of an adjoining building as one side of a shed on his own premises, is not liable to the adjoining owner for the use of the wall.)

COMPLAINTS IN ACTIONS UPON A GUARANTY.

[Principal Case, p. 188, this Vol.]

Georgia.—*Sims v. Clark*, 91 Ga., 302; s. c. 18 S. E. Rep., 158. (Complaint held sufficient on demurrer, which set forth a copy of an account and the contract of the guaranty thereof, and alleged plaintiff's acceptance of the guaranty, and the non-payment of the account.) *Michigan*.—*Clark v. Kellogg*, 96 Mich., 171; s. c. 55 N. W. Rep., 667. (Where the guaranty provides that plaintiff shall use due diligence in the collection of the debt guaranteed, an allegation that plaintiff used due diligence is equivalent to an averment that he pursued the course which the law imposed on him to charge the guarantor; but under such allegation plaintiff cannot show a waiver by defendant of any requirement necessary to charge him.) *New York*.—*Cahill Iron Works v. Pemberton*, 30 Abb. N. C., 450; s. c. 27 N. Y. Supp., 931. (A complaint alleging that the guaranty was given in consideration that the plaintiff should renew the notes whose payment is guaranteed, is sufficient on demurrer, though the complaint sets forth a writing which purports to contain the guaranty, but which is defective under the statute of frauds in not stating the consideration.) *Peters v. Chamberlain*, 86 State Rep., 1000; s. c. 13 N. Y. Supp., 457. (Where complaint charges defendants as guarantors of a note, it cannot be amended at the trial to conform pleading to proof so as to charge defendants as indorsers.) *Oklahoma*.—*Walter A. Wood Mowing, etc., Co. v. Farnham*, 1 Okla., 375; s. c. 33 Pac. Rep., 867. (An undertaking indorsed on a note: "For value received I hereby guaranty the payment of the within note, waiving demand and protest," is not merely a guaranty that the note shall be paid by the maker, but an original promise to pay it; and in an action thereon the maker's insolvency, or plaintiff's efforts to collect the note need not be alleged.) *South Dakota*.—*Greely v. McCoy*, 3 S. D., 624; s. c. 52 N. W. Rep., 1050. (Complaint on a guaranty of collection is bad on demurrer, if it fails to allege demand upon the principal debtor, or any excuse for not making it.)

COMPLAINTS IN ACTIONS UPON JUDGMENTS.

[Principal Case, p. 161, this Vol.]

Alabama.—*Andrews v. Flack*, 88 Ala., 294; s. c. 6 So. Rep., 907. (To describe the judgment, it is sufficient to state the court in which it was recovered, the place where the court was held, the names of the parties,

the date of the judgment and the amount recovered.) *Sims v. Hertzfeld*, 95 Ala., 145; s. c. 10 So. Rep., 227. (Where the judgment is sufficiently described, no description of the contract on which the judgment was recovered is necessary.) *California*.—*Weller v. Dickinson*, 93 Cal., 108; s. c. 28 Pac. Rep., 854. (A judgment of a court of general jurisdiction is sufficiently pleaded without any allegation as to the jurisdictional facts, even in the short form.) *Bronzan v. Drobaz*, 98 Cal., 647; s. c. 29 Pac. Rep., 254. (It is not necessary to state that there has been no appeal, or that plaintiff has obtained leave of court to sue.) *Edwards v. Kellings*, 99 Cal., 214; s. c. 33 Pac. Rep., 799. (It must be directly alleged that a judgment has been recovered; it is not sufficient to allege, that it has been “adjudged” that the defendant pay the plaintiff a specified amount.) *Missouri*.—*Wise v. Loring*, 54 Mo. App., 258. (An allegation that the judgment remains valid and in full force is equivalent to an allegation that it is unpaid.) *New York*.—*Wright v. Chapin*, 74 Hun, 521; 31 Abb. N. C., 137; s. c. 56 State Rep., 718; 26 N. Y. Supp., 825. (In an action upon a foreign judgment directing the payment of money into court, an allegation, that under and pursuant to the laws of Canada, and the rules and practice of its courts, the judgment has all the force and effect of a personal judgment, and that plaintiff is entitled under said laws and practice to enforce the judgment as a personal judgment, and to receive payment for the purpose of enforcing it, sufficiently alleges the effect of the judgment under the foreign laws.) *Crane v. Crane*, 19 N. Y. Supp., 691. (Complaint held sufficient on demurrer, which alleged the recovery of a judgment in a court of another State; that the court was a court of general jurisdiction; that the judgment directed the payment of a specified sum, and that defendant was personally served with process in the action in which the judgment was recovered.) *Wiehle v. Schwarz*, 54 Super. Ct., 169. (Where an action was brought against Anton Schwarz, and the complaint alleged the recovery of a judgment against A. Schwarz, *held*, that the complaint was bad on demurrer for not alleging that defendant was known by the latter name.) *Oregon*.—*Beekman v. Hamlin*, 19 Ore., 383; s. c. 25 Pac. Rep., 672. (If complaint shows facts which would raise a presumption of payment from lapse of time, it is bad on demurrer, unless it allege facts to rebut such presumption.) *Cougill v. Farmers', etc., Ins. Co.*, 25 Ore., 360; s. c. 35 Pac. Rep., 975. (In an action upon a judgment recovered in another State, complaint alleged that an order vacating the judgment was vacated and annulled on a writ of certiorari. *Held*, that the complaint was bad in that it did not allege remittitur to the lower court.) *Texas*.—*Hall v. McKay*, 78 Tex., 248; s. c. 14 S. W. Rep., 615. (A petition upon a judgment of another State need not attach a copy of the record as an exhibit.) *Henry v. Allen*, 82 Tex., 35; s. c. 17 S. W. Rep., 515. (A transcript of a judgment of a court of another State showing the action to have been tried before a special judge because the regular judge was disqualified, is admissible in evidence, although the petition does not allege that by the laws of the State in which the judgment was recovered the special judge was authorized to try the case.) *Washington*.—*Weber v. Yancy*, 7 Wash., 84; s. c. 34 Pac. Rep., 473. (An action may be brought on a judgment of a court of

another State without leave of court, although by the law of the State where the judgment was rendered no action can be maintained on a judgment without leave.) *Wisconsin*.—Piershoff v. Jorges, 86 Wis., 128; s. c. 56 N. W. Rep., 735. (Short form of pleading a judgment of a court of special jurisdiction complied with by an allegation that plaintiff recovered judgment against defendant, and that such judgment was "duly docketed.")

COMPLAINTS IN ACTIONS FOR MONEY HAD AND RECEIVED.

[Principal Case, p. 179, this Vol.]

Georgia.—Minor v. Ozier, 84 Ga., 476; s. c. 10 S. E. Rep., 1088. (Complaint alleging, in effect, that plaintiff had given defendant money to settle with certain of plaintiff's creditors, that defendant had neglected to do so, and that plaintiff had effected a settlement with the creditors by other means—states a cause of action for money had and received.) *Snook v. Ragean*, 89 Ga., 251; s. c. 15 S. E. Rep., 364. (A declaration alleging that defendant was indebted for a specified sum received for plaintiff's use, and which he promised to pay plaintiff when requested, may be amended so as to allege demand therefor, and, as amended it states a cause of action.) *Indiana*.—Smythe v. Scott, 124 Ind., 183; s. c. 24 N. E. Rep., 685. (An averment that defendant received a large sum of money for plaintiffs and that though often requested he has refused to account for it or pay it over, sufficiently alleges indebtedness and non-payment.) *Warden v. Nolan*, Ind. App., 1894, 37 N. E. Rep., 821. (In an action for money had and received, it is not necessary that plaintiff should allege demand.) *Kentucky*.—Martin v. Richardson, 94 Ky., 183; s. c. 21 S. W. Rep., 1039. (Complaint alleging that plaintiff by fraud had been induced to surrender a lottery ticket, which unknown to him had drawn a prize, and that defendant had received the prize money, states a cause of action for money had and received, and is not founded on the purchase of a lottery ticket.) *Massachusetts*.—Holst v. Stewart, 161 Mass., 516; s. c. 37 N. E. Rep., 755. (A count for money had and received with a bill of particulars claiming cash paid "by mistake and under misapprehension of facts at the time of conveyance," etc., is, in absence of motion for further particulars, sufficient on demurrer.) *Michigan*.—Lane v. Pere Marquette Boom Co., 62 Mich., 63; s. c. 28 N. W. Rep., 786. (Money paid on an express contract by mistake may be recovered on the common counts without setting up the special agreement.) *Missouri*.—Johnson-Brinkman Co. v. Central Bank, 116 Mo., 588; s. c. 22 S. W. Rep., 813. (Petition alleging the conversion of wheat by defendant, and that he had the proceeds thereof equal to its value, and demanding the value of the wheat, is sufficient to support a verdict for money had and received, especially where tried on that theory.) *Nebraska*.—Fletcher v. Cummings, 33 Neb., 793; s. c. 51 N. W. Rep., 144. (In an action for money received by plaintiff's agent, an averment that

defendant neglected and refused to pay a specified sum, though requested so to do, sufficiently alleges demand.) *New York*.—Cohn v. Beckhardt, 63 Hun, 333; 44 State Rep., 544; s. c. 18 N. Y. Supp., 84. (Complaint alleging that defendant employed by plaintiff as agent to collect money, and that he refused to pay it over "but wholly misappropriated and misapplied the same to his own use," states a cause of action on contract, and plaintiff can recover without proving any tortious act.) *S. P. Harlow v. Mills*, 58 Hun, 391; s. c. 12 N. Y. Supp., 197; 34 State Rep., 776. *Gilpin v. Daly*, 24 Abb. N C., 216; s. c. 11 N. Y. Supp., 61. (Though at common law, an employer may recover from a person, who won at gaming from an employe the employer's money, under the common counts, under the new procedure an allegation that the money was lost in a gaming house of which defendant was proprietor will not be stricken out as immaterial.) *United States*.—Wilson v. Haley Live-stock Co., 153 U. S., 89; s. c. 14 Supm. Ct., 768. (In an action of trespass *de bonis asportatis*, plaintiff cannot recover on a count for money had and received, at least not without amendment.) *Washington*.—Park v. Mighell, 3 Wash., 787; s. c. 29 Pac. Rep., 556. (An agent's action for commissions is not an action for money had and received by the principal, though it is alleged that he has received the proceeds of the sale, and appropriated them to his own use.) *Distler v. Dabney*, 3 Wash., 200; 28 Pac. Rep., 835. (Under the new procedure, plaintiff cannot recover back purchase money on the rescission of contract, under a complaint in the form of the common counts for money had and received.) Followed in *Clark v. Sherman*, 5 Wash., 631; s. c. 32 Pac. Rep., 771. *Wisconsin*.—Burke v. Milwaukee, etc., Ry. Co., 83 Wis., 410; s. c. 53 N. W. Rep., 692. (In an action to recover back money fraudulently obtained, an allegation that "the money was received by the defendant for the use of plaintiff," negatives a gift.)

COMPLAINTS IN ACTIONS FOR NUISANCE.

[Principal Case, p. 207, this Vol.]

California.—Castle v. Smith, California, 1894, 36 Pac. Rep., 859. (Where the nuisance was erected by defendant's grantor, notice to defendant that the erection was a nuisance is essential to plaintiff's cause of action.) *Colorado*.—Walley v. Platte, etc., Ditch Co., 15 Colo., 579; s. c. 26 Pac. Rep., 129. (Allegations that a ditch is dangerous to public health and safety, that it is a public nuisance and that it is dangerous to the health and safety of all who have occasion to transact business in the vicinity, do not authorize the recovery of special damages.) *Idaho*.—Redway v. Moore, 2 Ida., 1036; s. c. 29 Pac. Rep., 104. (In an action by a private party to enjoin a public nuisance the complaint must allege facts to show that plaintiff has sustained a special injury different in kind from that sustained by the general public.) *Illinois*.—Barrows v. Sycamore, 150 Ill., 588; s. c. 37 N. E. Rep., 1096. (A city has no right to erect a standpipe in a public street, and in an action by a property owner for

damages caused thereby, an allegation that it obstructs the light to plaintiff's building is sufficient to show special damages in order to enable plaintiff to maintain the action.) *Laffin & R. Powder Co. v. Tearney*, 131 Ill., 322; s. c. 23 N. E. Rep., 389. (If the declaration states facts showing defendant's business constitutes a nuisance, it is not necessary to use the word nuisance in describing it.) *Laffin R. Powder Co. v. Tearney*, *supra*. (In an action for a private nuisance, it is not necessary to charge defendant with negligence in the management of the business which constitutes the nuisance.) *Massachusetts*.—*Boston Ferrule Co. v. Hills*, 159 Mass., 147; s. c. 34 N. E. Rep., 85. (Where a bill, by occupant of one floor to enjoin the occupants of the floor above, alleged that defendants used sand and acids in their business and allowed these substances to come through holes in the floor, which were properly there, whereby complainant's machinery was damaged, *held*, that the bill was sufficient on demurrer, though it did not allege in terms that the defendant's business was unsuitable to be carried on in the building; nor that there was negligence in the mode of carrying it on, nor that complainants had used due care.) *Missouri*.—*Paddock v. Somes*, 102 Mo., 226; s. c. 14 S. W. Rep., 746. (It is proper in an action for the maintenance of a nuisance to unite a prayer for damages sustained thereby with a prayer for an injunction against its continuance.) *New Jersey*.—*Hudson Co. B'd of Health v. N. Y. Horse Manure Co.*, 47 N. J. Eq., 1; s. c. 19 Atl. Rep., 1098. (In an action by an individual to abate a nuisance of a kind, which a board of health might maintain an action to abate, under act of May 5, 1889, sec. 9, the bill must allege special and peculiar injury to plaintiff.) *New York*.—*Fisher v. Rankin*, 25 Abb. N. C., 191. (An amendment cannot be allowed, which changes the cause of action from one for negligence to one for the creation of a nuisance.) *Jorgensen v. Squires*, 50 State Rep., 181; s. c. 21 N. Y. Supp., 383. (Where the sole allegation of nuisance was that defendant's cellar extended more than five feet beyond the stoop line into a public sidewalk, *held*, error to charge in effect, generally, that the cellar was a nuisance, and to refuse to charge that, if it did not extend more than five feet beyond the stoop line it was not a nuisance *per se*.) *Campbell v. U. S. Foundry Co.*, 73 Hun, 576; 57 State Rep., 265; 26 N. Y. Supp., 165. (Complaint need not expressly allege that the acts complained of constitute a nuisance, in order to allow plaintiff to recover therefor; it is sufficient to state that "defendant so negligently and carelessly" did the acts as to cause the damage.) *Smith v. Ingersoll-Sargeant Rock-Drill Co.*, 7 Misc., 374; s. c. 27 N. Y. Supp., 907. (An allegation that by the negligent operation of a steam hammer on defendant's premises, the use of plaintiff's premises adjoining was interfered with, does not necessarily render the action one for negligence; so as to prevent recovery on proof that the hammer's excessive size caused the injury complained of.)

COMPLAINTS IN ACTIONS FOR NEGLIGENCE.

[Principal Case, p. 186, this Vol.]

- (1) *The facts constituting the negligence.*
- (2) *Wilful act or negligence.*
- (3) *Several acts of negligence.*
- (4) *Defendant's duty.*
- (5) *Plaintiff's freedom from contributory negligence.*
- (6) *Injury, damage, etc.*

- (1) *The facts constituting the negligence.*

Alabama.—*Mary Lee Coal and R. Co. v. Chambliss*, 97 Ala., 171; s. c. 11 So. Rep., 897. (A general averment that the act causing the injury was negligently done is sufficient;) S. P.; *Birmingham R. & E. Co. v. Allen*, Alabama, 1893; 13 So. Rep., 8. *Oxford Lake Line v. Stedham*, Alabama, 1893, 13 So. Rep., 553. (In an action against a railroad company, held, that it was sufficient for the complaint to allege that the plaintiff's mule was frightened at the unnecessary noise of defendant's train near a highway, and "owing to the negligence of defendant's employees running and managing said cars.") *Arizona.*—*Santa Fe, etc., Ry. Co. v. Hurley*, Ariz., 1894, 36 Pac. Rep., 216. (Under an allegation that plaintiff's injuries were caused by a defective pile-driver, recovery cannot be had for injuries received on account of an unmanageable team used in operating it.) *California.*—*House v. Meyer*, 100 Cal., 592; s. c. 35 Pac. Rep., 308. (Complaint alleging generally negligence on defendant's part is sufficient on demurrer.) *Colorado.*—*McGonigle v. Kane*, Colorado, 1894, 38 Pac. Rep., 367. (Negligence being the ultimate fact to be established, a general allegation thereof is sufficient.) *Denver, &c., R. Co. v. Robbins*, 2 Colo. App., 313; s. c. 30 Pac. Rep., 261. (Complaint held sufficient, which alleged that the defendant railroad company was unlawfully and negligently occupying a street crossing in the violation of city ordinance and that by reason of that fact, and without any negligence on plaintiff's part, the injury resulted.) *Florida.*—*Walsh v. Western R. Co.*, 34 Fla., 1; s. c. 15 So. Rep., 686. (In alleging negligence, it is not required that the facts constituting the negligence shall be set out in the declaration, but it is sufficient, if the acts causing the injury are specified, and it is alleged that they were negligently and carelessly done;) S. P.; *Jacksonville, &c., Ry. Co. v. Jones*, 34 Fla., 286; s. c. 15 So. Rep., 924. *City of Orlando v. Heard*, 29 Fla., 581; s. c. 11 So. Rep., 182. (Declaration held demurrable, which generally alleged that a municipal corporation negligently suffered a highway to remain out of repair, without alleging defendant's knowledge of the defect, the time it was permitted to remain out of repair, or other facts showing negligence of the municipality.) *Illinois.*—*Lavis v. Wisconsin C. R. Co.*, 54 Ill. App., 636. (A declaration held sufficient, which charged that the negligence consisted of the negligently running and operation of a railroad, and the cars propelled thereon.) *Andrew v. Chi. & N. W. R. Co.*, 45 Ill. App., 269. (It is error to sustain a demurrer to a declaration clearly alleging negligence on the part of defendant, and care on the part of plaintiff, although the facts sur-

rounding the accident are stated with unnecessary particularity. In such a case, the question of negligence or contributory negligence, should be left to be determined by the jury, unless the facts alleged would necessarily bar recovery.) *Chi., &c., R. Co. v. Hines*, Illinois, 1890, 23 N. E. Rep., 1021. (In an action against a railroad company for negligence in the construction of its road, whereby the employee was killed, declaration held sufficient to support judgment, though it did not state that the defendant knew of the defect in the road, or that plaintiff did not know of it.) *Indiana*.—Board of Com'ers Huntington County v. Huffman, 134 Ind., 1; s. c. 31 N. E. Rep., 570. (Complaint held sufficient on demurrer, where the acts causing the injury were alleged to have been negligently and carelessly done, without stating the specific facts constituting the negligence.) *S. P., Louisville, &c., Ry. Co. v. Berkey*, 136 Ind., 181; s. c. 35 N. E. Rep., 3; *Louisville, etc., R. Co. v. Hicks*, Indiana Appeals, 1894; s. c. 37 N. E. Rep., 43; *Citizens' St. R. Co. v. Lowe*, Indiana Appeals, 1894; s. c. 39 N. E. Rep., 165; *City of Lebanon v. McCoy*, Indiana Appeals, 1895; s. c. 40 N. E. Rep., 700. *Coal Bluff Min. Co. v. Watts*, 6 Ind. App., 347; s. c. 33 N. E. Rep., 662. (Complaint, as against demurrer, held to allege negligence with sufficient specificity, where it alleged that defendant negligently permitted the roofing of the mine, in which plaintiff was working, to become unsafe, and negligently failed to secure it, by reason whereof rocks fell on plaintiff.) *S. P., Hindman v. Timme*, Indiana, 1893, 35 N. E. Rep., 1046. *Chicago, &c., R. Co. v. Barnes*, 2 Ind. App., 213; s. c. 28 N. E. Rep., 323. (Motion to make complaint more definite and certain denied, where it was alleged that defendant negligently did or omitted to do the act or thing causing the injury; since to require plaintiff to plead all the facts and circumstances from which negligence could be inferred would compel him, in many cases, to plead evidence.) *Ohio, &c., Ry. Co. v. Craycraft*, 5 Ind. App., 335; s. c. 32 N. E. Rep., 297. (Complaint held sufficiently specific which alleged that the defendant railroad company, without any negligence on plaintiff's part, carelessly and negligently ran the train over plaintiff's mule.) *Wabash W. R. Co. v. Morgan*, 132 Ind., 430; s. c. 31 N. E. Rep., 661. (In an action by an employee for injuries caused by a defective engine, and the engineer's negligence, held, that it was sufficient to allege that both facts had long been known to defendant, without specifying the exact time.) *Kansas*.—*Cherokee, etc., Min. Co. v. Wilson*, 47 Kan., 460; s. c. 28 Pac. Rep., 178. (Under an allegation to the effect, that defendant permitted the accumulation of inflammable dust in its mine and failed to remove and sprinkle the same, evidence is inadmissible to show that the mine was improperly laid out and constructed or that it was not properly provided with doors.) *Massachusetts*.—*Benjamin v. Holyoke St. Ry. Co.*, 160 Mass., 3; s. c. 35 N. E. Rep., 95. (General averment of negligence on the part of a street railway company in running its cars is sufficient to include negligence in the sounding of a gong on approaching a frightened team.) *Dolan v. Alley*, 153 Mass., 380; s. c. 26 N. E. Rep., 989. (Where it was alleged, that the roof, which fell and injured plaintiff, was defective, and that defendant had neglected to repair it, held, that there was no variance, though the proof showed, that the immediate cause of the falling of the

roof was plaintiff's neglect to remove the snow therefrom.) *Minnesota*.—*Rogers v. Truesdale*, Minnesota, 1894, 58 N. W. Rep., 688. (Demurrer overruled, where complaint alleged that defendant's act causing plaintiff's injury was negligently done without stating any details which would indicate negligence.) *Missouri*.—*Wills v. Cape Girardeau, &c., Ry. Co.*, 44 Mo. App., 51. (Petition is sufficient on demurrer, if it advises defendant of the particular negligence complained of, so that he may know what he is called upon to defend, though it does so in general terms.) *Montana*.—*Kelly v. Cable Co.*, 18 Mont., 411; s. c. 34 Pac. Rep., 611. (An allegation that defendant's employees were negligent and careless, held to be equivalent to an allegation that they were incompetent.) *Nebraska*.—*Aurora v. Cox*, Nebraska, 1895, 62 N. W. Rep., 66. (Petition held to sufficiently charge negligence against a city, which alleged facts from which it might reasonably be inferred that the highway was not kept in proper condition.) *New York*.—*Flynn v. Central R. R. of N. J.*, 15 N. Y. Supp., 328; s. c. 20 Civ. Pro., R. 179. (A complaint, not expressly alleging that defendant's negligence caused plaintiff's injury, is not demurrable, if it allege that the doing, or omission, of specific acts by the defendant, which of themselves would constitute negligence, caused the injury.) *Jackman v. Lord*, 56 Hun, 172; s. c. 9 N. Y. Supp., 200, 30 State Rep., 507. (Motion to make complaint more definite and certain denied, where it generally alleged that the explosion which injured plaintiff was caused by defendant's negligence. The remedy, if any, to obtain a statement of the particular acts of the negligence, was by an application for a bill of particulars.) *Wolz v. Dry Dock, etc., R. Co.*, 13 N. Y. Supp., 129; s. c. 36 State Rep., 328. (Motion to strike out an allegation, that there were many previous derailments of cars, of which defendant had knowledge, at the place where the car was derailed, which caused plaintiff's injury,—denied.) *Boehm v. Mace*, 28 Abb. N. C., 138; s. c. 18 N. Y. Supp., 106. (Under complaint alleging that the accident was occasioned by the unsafe condition of the elevator car, held, error to submit to the jury whether defendant had complied with the statute regulating the enclosing of elevator shafts.) *Davis v. N. Y., Lake Erie, etc., R. Co.*, 20 Abb. N. C., 230. (Under an allegation that the locomotive which exploded was defective, evidence is inadmissible to show that unfit coal was used, although an engine of different construction might have used like coal with safety.) *North Carolina*.—*Conley v. Richmond, etc., R. Co.*, 109, N. C., 692; s. c. 14 S. E. Rep., 303. (The facts constituting the alleged negligence must be set out with sufficient particularity to apprise defendant of the nature of the charge.) *Oregon*.—*McPherson v. Pac. Bridge Co.*, 20 Ore., 486; s. c. 26 Pac. Rep., 560. (A general allegation of negligence does not charge any fact.) *Woodward v. Ore. Ry., etc., Co.*, 18 Ore., 289; s. c. 23 Pac. Rep., 1076. (Plaintiff must allege the particular acts of negligence constituting his cause of action, and recovery cannot be had on proofs of acts of negligence other than those alleged.) *Knahtla v. Ore., etc., Ry. Co.*, 21 Ore., 136; s. c. 27 Pac. Rep., 91. (Under an allegation that defendant negligently suffered a bridge to become out of repair and to remain in an unsafe condition, there can be no recovery on the ground that

the bridge was originally improperly constructed.) *Rhode Island*.—*Parker v. Providence, etc.*, S. S. Co., 17 R. I., 376 ; s. c. 22 Atl. Rep., 234. (Demurrer overruled to a complaint in an action for death, which alleged that defendant's servants so negligently and carelessly managed and navigated the steamer that it ran upon and sank the vessel of plaintiff's testator.) *Pomroy v. Granger*, R. I., 1894, 29 Atl. Rep., 690. (Demurrer sustained to a count which alleged that the defendant, a city, carelessly and negligently excavated in a river bottom, so as to cause the piles of plaintiff's coal pocket to bulge outward and to become unsafe without showing in what respect defendant was negligent in doing the thing alleged.) *S. P. Wilson v. N. Y., N. H., etc.*, R. Co., R. I., 1894, 29 Atl. Rep., 258 ; *Cox v. Providence Gas. Co.*, 17 R. I., 199 ; s. c. 21 Atl. Rep., 344. *Texas*.—*Gulf, etc., R. Co. v. Smith*, 74 Tex., 276, s. c. 11 S. W. Rep., 1104. (Allegation that the car was derailed and overturned "by the gross negligence, carelessness and default of defendant, its agents, servants and employees," is sufficient, without alleging particular acts of negligence, and will admit evidence that accident was caused by spreading of tracks from defective ties.) *San Antonio St. Ry. Co. v. Caillonette*, 79 Tex., 341 ; s. c. 15 S. W. Rep., 390. (It is not necessary to allege that the facts constitute negligence, if the conclusion of negligence can be drawn from them.) *Texas, etc., R. Co. v. Easton*, 3 Tex. Civ. App., 378 ; s. c. 21 S. W. Rep., 575. (An allegation that the injuries were caused by the negligence of "defendant, its agents and employees" is sufficient without specifying the particular agent or employee guilty of the negligence.) *Galveston, etc., Ry. Co. v. Croskell*, 6 Tex. Civ. App., 160 ; s. c. 25 S. W. Rep., 486. (An allegation that one of the defendant's trains negligently struck the cars placed on a side track, *held*, sufficient without showing particularly how it negligently struck them.) *Gulf, etc., R. Co. v. Smith*, Tex. Civ. App., 1894, 26 S. W. Rep., 644. (In an action against a railroad for injuries received at a street crossing from a car making a flying switch, *held*, that it was not necessary to allege defendant's rules regulating such operation ; as such rules were but evidence tending to establish the negligence alleged.) *United States*.—*Gulf, etc., R. Co. v. Washington*, 49 Fed. Rep., 347 ; s. c. 1 C. C. A., 286 ; 4 U. S. App., 121. (A general allegation of negligence, without stating the particular acts constituting the negligence, is good against a general demurrer.) *Sledge v. Gayoso Hotel Co.*, 43 Fed. Rep., 463. (Where a declaration sufficiently alleges negligence, and goes further than need be in specifically stating the facts, the court will not on demurrer undertake to determine whether the facts alleged show negligence, or contributory negligence, but will leave the question to be determined at the trial.) *Parrott v. New Orleans, etc., R. Co.*, 62 Fed. Rep., 562. (In an action by a servant against a railroad company for injuries caused by a washout of defendant's roadbed, *held*, on demurrer, that an allegation, that the defect continued for an unreasonable length of time, stated a mere conclusion.) *Vermont*.—*Preston v. St. Johnsbury, etc., R. Co.*, 64 Vt., 280 ; s. c. 25 Atl. Rep., 486. (Demurrer overruled to a complaint, alleging that the accident occurred, because defendant furnished decedent with a car which was insufficiently, carelessly and negligently constructed, and of unfit material, without

otherwise specifying of what the negligent construction consisted.) *Devino v. Central Vt. Ry. Co.*, 63 Vt., 98; s. c. 20 Atl. Rep., 958. (It is not enough for a count to merely allege that defendant in disregard of his duty as carrier permitted the plaintiff to be injured; facts from which the negligence resulted must be stated.) *West Virginia*.—*Poling v. Ohio River R. Co.*, 38 W. Va., 645; s. c. 18 S. E. Rep., 782. (On demurrer, *held*, that it was not usual nor necessary to specify the acts, or omissions, which constitute the negligence.) *Wisconsin*.—*Hanson v. Anderson*, Wis., 1895, 62 N. W. Rep., 1055. (Motion to make complaint more definite and certain denied, where it was alleged that while plaintiff was driving along a highway, defendant drove up behind at a great speed and negligently ran into plaintiff's vehicle.) *Barron v. Chic., etc., Ry. Co.*, Wis., 1894, 61 N. W. Rep., 303. (Where plaintiff's injury is alleged to have been occasioned because defendant's train did not give a signal, recovery cannot be had on the ground that the whistle was sounded, and frightened plaintiff's horse.) *Wyoming*.—*Hazard Power Co. v. Volger*, 3 Wyo., 189; s. c. 18 Pac. Rep., 636. (A vague allegation of negligence and carelessness in storing explosives, without stating any negligent act of omission or commission, *held*, insufficient.)

(2) *Willful act or negligence.*

Alabama.—*Kansas City, etc., R. Co. v. Crocker*, 95 Ala., 412; s. c. 11 So. Rep., 262. (Under a complaint alleging that defendant acted "negligently, carelessly and recklessly," plaintiff is not bound to make out such a case that his own contributory negligence would not bar recovery; since a charge of recklessness does not imply willfulness.) *S. P. Louisville, etc., R. Co. v. Barker*, Alabama, 1893, 14 So. Rep., 282. (In an action by a trespasser against a railroad company for injuries from being struck by a train, complaint *held* not demurrable on the ground that it did not allege that plaintiff's injury was inflicted wantonly or intentionally and that the allegations did not show that plaintiff was guilty of other than ordinary negligence, where it is alleged that the injury resulted from defendant's wanton or reckless negligence.) *Indiana*.—*Louisville, etc., R. Co. v. Davis*, 7 Ind. App., 222; s. c. 33 N. E. Rep., 451. (Complaint alleging that defendant's servants in charge of a locomotive "willfully caused a large amount of steam to escape" which frightened plaintiff's horse, *held*, to be founded on negligence and that the allegation of willfulness was surplusage.) *Michigan*.—*Richter v. Harper*, 95 Mich., 221; s. c. 54 N. W. Rep., 768. (*Held*, that plaintiff was not required to show that defendant acted maliciously, though the declaration used the words "willfully, wantonly, negligently and unlawfully" in connection with other words imputing negligence to defendant.) *Montgomery v. Muskegon Booming Co.*, 88 Mich., 633; 50 N. W. Rep., 729. (The word "willfully" used in certain count of declaration, *held*, to imply malice, and that there could be no recovery under it, unless the evidence showed that the negligent acts complained of were done maliciously.) *Mississippi*.—*So. Exp. Co. v. Brown*, 67 Miss., 260; s. c. 8 So. Rep., 425. (Under an allegation of negligence, plaintiff may prove a negligence so gross as to be willful.) *Mis-*

souri.—*O'Brien v. Loomis*, 43 Mo. App., 29. (Where plaintiff pleads that an injury was caused by the negligence of the defendant, he cannot recover for an intentional injury.) *New York*.—*Moore v. Drayton*, 16 N. Y. Supp., 723; s. c. 40 State Rep., 933. (The added words, "recklessly and willfully," regarded as surplusage at the trial, where the act causing the injury was alleged to have been "negligently, recklessly and willfully" done; as the same act cannot be both negligent and willful.) *North Carolina*.—*McAdoo v. Richmond, etc.*, R. Co., 105 N. C., 140; s. c. 11 S. E. Rep., 316. (The word "gross," when used in connection with allegation of negligence, regarded as a mere expletive, and recovery may be had for defendant's failure to use ordinary care.)

(3) *Several acts of negligence.*

Alabama.—*Louisville, etc., R. Co. v. Mothershed*, 97 Ala., 261; s. c. 12 So. Rep., 714. (Where several distinct acts of negligence on the part of defendant, or his servants, caused plaintiff's injury, it is proper to count on each act of negligence separately, and the proof of any one will authorize a recovery.) *Highland Ave., etc., R. Co. v. Dusenberry*, 94 Ala., 413; s. c. 10 So. Rep., 274. (Where the same count attributed the death of plaintiff's intestate to several distinct negligent acts and omissions of defendant, *held*, that it was demurrable on the ground of uncertainty and ambiguousness, in stating several independent causes of action, without disclosing which one was relied upon.) *Louisville, etc., R. Co. v. Hall*, 91 Ala., 112; s. c. 8 So. Rep., 371. (A count, charging several cumulative acts of negligence, is not demurrable, because one of the acts charged does not constitute negligence, if the other acts alleged show a good cause of action.) *Kansas City, etc., R. Co. v. Burton*, 97 Ala., 240; s. c. 12 So. Rep., 88. (Where, in the same count, plaintiff's injury was ascribed to defendant's yard master in allowing a car to remain in a dangerous position "and" to the negligence of defendant's engineer in running a train, *held*, that as the acts of yard master and engineer were in no way related and complaint charged plaintiff's injury to the concurrent acts of both, there could be no recovery except on proof of the negligence of both.) *Illinois*.—*North Chic. St. Ry. Co. v. Cotton*, 140 Ill., 486; s. c. 29 N. E. Rep., 899. (Evidence may be admitted though it tends to support a charge of negligence not made by the declaration, if it is material to the proof of the negligent acts alleged.) *Michigan*.—*Thompson v. Toledo, etc., R. Co.*, 91 Mich., 255; s. c. 51 N. W. Rep., 995. (Though several concurrent acts of negligence are alleged in one count as producing the injury, plaintiff need not prove, in order to recover, such of them as are immaterial.) *New York*.—*Cordelia v. Dwyer*, 9 Misc., 399; s. c. 29 N. Y. Supp., 1073. (Where it appears that the damages sued for resulted from one of several causes, and the defendant is not responsible for all of them, plaintiff cannot recover without showing that the damage resulted from a cause for which defendant was responsible.) *South Carolina*.—*Ruff v. Columbia, etc., R. Co.*, South Carolina, 1894, 20 S. E. Rep., 27. (Complaint held to state two distinct causes of action, which alleged that a horse was killed by the negligent failure to keep a crossing in repair and the negligent manage-

ment of a train, with no averment of any connection between the two acts.) *Wisconsin*.—*Drefahl v. Connell*, 85 Wis., 109; s. c. 55 N. W. Rep., 160. (Complaint held not demurrable, which stated a cause of action because of defendant's failure to perform certain duties, though it attempted, but failed, to show other failures of duty.)

(4) *Defendant's duty.*

Alabama.—*Ensley Ry. Co. v. Chewning*, 93 Ala., 24; s. c. 9 So. Rep., 458. (Complaint held insufficient which alleged in effect that defendant was a common carrier, and that it ran its train so negligently that it knocked down and injured plaintiff, without alleging the existence of a relationship between the parties, which would require defendant to use a higher degree of care, or anything to show that plaintiff was not a trespasser upon defendant's premises at the time of the accident.) *Illinois*.—*Angus v. Lee*, 40 Ill. App., 304. (Facts must be stated to show legal liability; it is not sufficient to allege that a duty existed on defendant's part and that he violated that duty.) *S. P. Funk v. Piper*, 50 *Id.*, 168. *Rockford City R. Co. v. Matthews*, 50 Ill. App., 267. (Allegations of defendant's duty to repair crossing under city ordinance, not set forth, *held*, insufficient; facts to show duty must be stated.) *Chic. v. Apel*, 50 Ill. App., 132. (Allegation that it was the duty of a city to light bridge is mere conclusion, not a fact.) *Indiana*.—*Thiele v. McManus*, 3 Ind. App., 132; s. c. 28 N. E. Rep., 327. (In an action to recover for injuries caused by falling down an unguarded hatchway in defendant's store, *held*, that an allegation that plaintiff "while properly and necessarily in said building, without fault on her part, fell through such hatchway," etc., did not show that plaintiff was one of the class invited to visit the premises, to whom plaintiff owed a duty, and that demurrer to complaint should have been sustained.) *Missouri*.—*Rushenberg v. St. Louis, etc., Ry. Co.*, 109 Mo., 112; s. c. 19 S. W. Rep., 216. (In an action for personal injuries to a child of eight, caused by defendant's car running over him, while he was under it, gathering pieces of ice dropped in unloading the car, complaint held to be demurrable, in that it did not allege any facts to show that defendant unloaded the car so as to make it liable for any attraction that the pieces of falling ice furnished decedent.) *New Jersey*.—*Falk v. N. Y., etc., R. Co.*, 56 N. J. L., 380; s. c. 29 Atl. Rep., 157. (An averment that it was the duty of defendant, a railway company, to furnish a passenger safe ingress and egress from its cars, sufficiently alleges defendant's duty in that respect, although indefinite, to sustain the declaration against the objection, that it does not state a cause of action.)

(5) *Plaintiff's freedom from contributory negligence.*

Alabama.—*Mary Lee Coal & R. Co. v. Chambliss*, 97 Ala., 171; s. c. 11 So. Rep., 897. (Plaintiff need not allege that he exercised due care.) *California*.—*House v. Meyer*, 100 Cal., 592; s. c. 35 Pac. Rep., 308. (Complaint is not demurrable because it fails to allege that plaintiff was free from contributory negligence.) *Florida*.—*City of Orlando v. Heard*, 29 Fla., 581; s. c. 11 So. Rep., 182. (Complaint need not aver plaintiff's

freedom from contributory negligence; such fact is involved in the averment that the injury was occasioned by defendant's negligence.) *Illinois*.—Consolidated Coal Co. v. Wombacher, 24 N. E. Rep., 627. (Declaration held sufficient to sustain judgment, though it did not allege that plaintiff was not guilty of contributory negligence; since contributory negligence was a matter of defense.) *Indiana*.—Cincinnati, &c., Ry. Co. v. Stanley, Indiana, 1891, 27 N. E. Rep., 316; s. c. 30 N. E. Rep., 1103. (Demurrer sustained, because complaint did not aver that plaintiff was without fault, nor anything from which such fact might be inferred.) S. P., Fort Wayne, &c., R. Co. v. Gruff, 132 Ind., 18; s. c. 31 N. E. Rep., 460. Richmond Gas Co. v. Baker, Indiana, 1895, 39 N. E. Rep., 552. (Demurrer sustained, where complaint alleged that plaintiff "had been" in all things free from negligence; since it did not allege his freedom from negligence at the time of injury.) Indianapolis, &c., Ry. v. Wilson, 134 Ind., 95; s. c. 33 N. E. Rep., 793. (Demurrer sustained, notwithstanding a general allegation that plaintiff was free from fault, where it appeared from other allegations that he had been guilty of contributory negligence.) Louisville, &c., Ry. Co. v. Sears, Ind. App., 1894, 38 N. E. Rep., 837. (In an action by a child of eight, a general averment that he was without fault is sufficient to negative the imputed negligence of his custodian.) S. P., Cleveland, &c., R. Co. v. Keely, Indiana, 1894, 37 N. E. Rep., 406. City of Columbus v. Strassner, 124 Ind., 482; s. c. 25 N. E. Rep., 65. (A general averment that plaintiff was without fault will be regarded as controlling upon demurrer, unless it clearly appears from the other facts alleged that he was guilty of contributory negligence.) S. P., Pennsylvania Co. v. Horton, 132 Ind., 189; s. c. 31 N. E. Rep., 45; Louisville, &c., Ry. Co. v. Stommel, 126 Ind., 863; s. c. 25 N. E. Rep., 863; Kentucky & Ind. Bridge Co. v. Quinkert, 2 Ind. App., 244; s. c. 28 N. E. Rep., 338; Louisville, &c., Ry. Co. v. Summers, 131 Ind., 241; s. c. 30 N. E. Rep., 873; Pennsylvania Co. v. McCormack, 131 Ind., 250; s. c. 30 N. E. Rep., 27; Evansville, &c., Co. v. Anthon, 6 Ind. App., 295; s. c. 33 N. E. Rep., 469; Linton Coal Min. Co. v. Persons, Ind., 1894; s. c. 39 N. E. Rep., 214; Evansville, &c., Co. v. Krapf, Ind., 1894, 36 N. E. Rep., 901; N. Y. Chic., &c., Ry. Co. v. Mushrush, Ind., 1894, 37 N. E. Rep., 954; Salem, &c., Lime Co. v. Griffin, Ind., 1894, 38 N. E. Rep., 411; Louisville, &c., R. Co. v. Berry, 2 Ind. App., 427; 28 N. E. Rep., 714; Mississinewa Min. Co. v. Patton, 129 Ind., 472; 28 N. E. Rep., 1113; Louisville, &c., R. Co. v. Pritchard, 131 Ind., 564; 31 N. E. Rep., 358; Alexandria Min. Co. v. Painter, 1 Ind. App., 587; 28 N. E. Rep., 113. Romona Oolitic Stone Co. v. Johnson, 6 Ind. App., 550; s. c. 33 N. E. Rep., 1000. (Complaint sufficient if from the facts alleged it appears that plaintiff was injured without contributory negligence.) S. P., Penn. Co. v. Davis, 29 N. E. Rep., 425. Ky., &c., Co. v. Hall, 125 Ind., 220; s. c. 25 N. E. Rep., 219. (In an action against a railroad company by the employee of another company complaint need not allege that plaintiff's fellow servants were not guilty of contributory negligence.) *Iowa*.—Gregory v. Woodworth, Iowa, 1895, 61 N. W. Rep., 962. (Complaint held demurrable which did not allege that plaintiff was not guilty of contributory negligence.) *Kentucky*.—Depp v. Louisville, &c., R. Co., Kentucky, 1890, 14 S. W. Rep., 363. (Plaintiff's

freedom from contributory negligence need not be alleged.) *Favre v. Louisville, &c., R. Co.*, 91 Ky., 541; s. c. 16 S. W. Rep., 870. (Petition is demurrable if it shows that plaintiff was guilty of contributory negligence.) *Durham v. Louisville, &c., R. Co.*, Kentucky, 1895; 29 S. W. Rep., 737. (Where it was alleged that plaintiff alighted from a train in the dark and was injured, *held*, that the complaint was demurrable in that it did not allege that plaintiff was not negligent in getting off under the circumstances.) *Missouri*.—*Mitchell v. City of Clinton*, 99 Mo., 153; s. c. 12 S. W. Rep., 793. (Complaint sufficient on demurrer without alleging the absence of contributory negligence.) *Hudson v. Wabash W. Ry. Co.*, 101 Mo., 13; s. c. 14 S. W. Rep., 15. (The defense of contributory negligence must be affirmatively pleaded; it cannot be raised by a denial of an allegation in the petition that the injuries were caused without fault on plaintiff's part.) *Young v. Shickle, &c., Iron Co.*, 103 Mo., 324; s. c. 15 S. W. Rep., 771. (An employee need not allege that he had no knowledge of the defective character of the machinery by which he was injured; knowledge of the defect being a matter of defense.) *New Jersey*.—*Falk v. N. Y., &c., R.*, 56 N. J. L., 380; s. c. 29 Atl. Rep., 157. (Contributory negligence sufficiently negated by declaration alleging that plaintiff, a passenger, injured by stepping off defendant's train in the dark, was unaware of the danger.) *New York*.—*Mele v. Del., etc., Canal Co.*, 14 N. Y. Supp., 630; s. c. 39 State Rep., 153. (Complaint, alleging that defendant's negligence caused plaintiff's injuries, is not demurrable because it does not expressly allege that there was no contributory negligence on plaintiff's part.) *Ohio*.—*Chic., &c., R. Co. v. Norman*, 49 Ohio St. Rep., 598; s. c. 32 N. E. Rep., 857. (An employee must aver want of knowledge on his part or the defect causing the injury or that having such knowledge he remained in the employment under the master's promise to remedy it. An averment that the injury occurred without the plaintiff's fault is not enough.) *Oregon*.—*Johnston v. Oregon, etc., R. Co.*, 23 Ore., 94; s. c. 31 Pac. Rep., 283. (Want of knowledge, or means of knowledge, by a switchman, of defects in a switch need not be averred by his administrator, in an action for his death caused thereby.) *Rhode Island*.—*Di Morcho v. Builders Iron Foundry*, 18 R. I.—; 27 Atl. Rep., 328. (Allegation of due care by plaintiff an inference of fact, not law.) *United States*.—*Parrot v. New Orleans, &c., R. Co.*, 62 Fed. Rep., 562. (Petition alleging that plaintiff was injured in uncoupling cars while the train was in motion, without explanation shows contributory negligence, and is bad on demurrer.) *Vermont*.—*Henry v. Fitchburg R. Co.*, 65 Vt., 436; s. c. 26 Atl. Rep., 484. (An allegation that plaintiff was in the careful and prudent discharge of the duties of his employment held to be a sufficient allegation as against demurrer, that he was not negligent in being in the place of injury.) *Virginia*.—*Norfolk, &c., R. Co. v. Gilman*, 88 Va., 239; s. c. 13 S. E. Rep., 475. (Declaration charging defendant with negligence, held sufficient, on demurrer, although it did not deny contributory negligence.) *West Virginia*.—*Carrico v. West Va., &c., Ry. Co.*, 35 W. Va., 389; s. c. 14 S. E. Rep., 12. (Complaint not demurrable because it fails to allege that plaintiff was not guilty of contributory negligence.)

(6) *Injury, damage, etc.*

California.—Cotter v. Lindgren, California, 1895, 39 Pac. Rep., 950. (Complaint reciting that defendant wrongfully dug a pit in certain highway, on Feb. 9th, and left the same unguarded during the night time; and that on Feb. 10th, plaintiff fell into the pit without any negligence on his part is demurrable in not showing that the pit was unguarded when plaintiff fell in.) *Indiana*.—McGahan v. Indianapolis National Gas Co., Ind., 1894, 37 N. E. Rep., 601. (Demurrer sustained, where complaint alleged negligence in defendant, gas company, in failing to turn off the gas as directed; and that plaintiff, a plumber, while searching for a defect in a gas pipe, was injured by an explosion; because it did not show that the injury was the proximate result of defendant's negligence, or that the injury was caused by some agency for which defendant was responsible.) Peerless Stone Co. v. Wray, Indiana App., 1894; s. c. 37 N. E. Rep., 1058. (Demurrer sustained on the ground, that complaint did not show either by direct allegation, or necessary inference, that the injuries sued for were the result of defendant's alleged negligence.) Board of Comm'rs Boone Co. v. Muchler, Indiana, 1894, 36 N. E. Rep., 534. (In an action against town commissioners, complaint held to sufficiently show that the accident was caused by the defective condition of a bridge, which alleged, that defendants neglected to provide the bridge with railings, that while plaintiff was driving across the bridge his horse became frightened at a hog, and backed off; and that the injuries were caused by defendant's said negligent conduct.) *Michigan*.—Thompson v. Village of Quincy, 88 Mich., 173; s. c. 47 N. W. Rep., 114. (Allegation, that plaintiff's arm and leg "were greatly hurt, cut, sprained, bruised, wounded, and injured * * * and that he was so injured in his arm and leg as to cripple him for life," is sufficiently specific to admit evidence that the arm was broken.) Shaddock v. Alpine Plank Road Co., 79 Mich., 7; s. c. 44 N. W. Rep., 158. (Under an allegation that plaintiff was hurt, bruised and wounded, evidence of fractures of shoulder arm and head, and a strain of the hip, producing temporary pain and permanent injury, is not admissible.) *Missouri*.—Slaughter v. Metropolitan St. Ry. Co., 116 Mo., 269; s. c. 23 S. W. Rep., 760. (Evidence of loss of time and earnings are inadmissible under an allegation that "the injury is permanent and will render plaintiff a cripple for life," without any allegation as to the loss of time occasioned thereby.) *New York*.—Frobisher v. Fifth Ave. Trans. Co., 81 Hun, 544; s. c. 63 State Rep., 287; 30 N. Y. Supp., 1099. (Under an allegation that plaintiff "has become disabled for life to such an extent as to seriously interfere with the active prosecution of his business," plaintiff may show, as special damage, the loss to his business resulting from the injuries sued for.) Taylor v. Town of Constable, 61 Hun, 622; s. c. 15 N. Y. Supp., 795; aff'd without opinion in 131 N. Y., 597; s. c. 30 N. E. Rep., 63. (Held, that it was no error not to dismiss complaint at trial, which alleged that a bridge was defective, but did not directly allege that falling of the bridge and plaintiff's injury were caused by such defect, where the meaning is evident.) *Texas*.—Texas, &c., R. Co. v. McCoy, 3 Tex. Civ. App., 276; s. c. 22 S. W. Rep., 926. (Demurrer sustained on the ground that the petition

did not show that the negligence alleged caused the injury claimed.) *Campbell v. Cook*, Texas, 1894, 26 S. W. Rep., 486. (Evidence that plaintiff's sexual powers were impaired is not admissible under an allegation that he was "severely injured in the back, bowels, hips and legs, and other parts and members of the body.") *Wisconsin*.—*Hanson v. Anderson*, Wisconsin, 1895, 62 N. W. Rep., 1055. (Motion to make complaint more definite and certain denied, where it was alleged, that plaintiff's arm, shoulder, and back were seriously and permanently injured, and his body otherwise bruised and injured, as the result of which he became sick and disordered and suffered great pain and distress. If defendant desires the items of damages his remedy is to apply for a bill of particulars.) *Kelly v. Town of Darlington*, 86 Wis., 432; s. c. 57 N. W. Rep., 51. (Allegation that "by reason, entirely of the insufficiency, want of repair and defects aforesaid of and in said bridge," plaintiff's wagon and team fell therefrom—sufficiently avers that the defects of the bridge were the proximate cause of plaintiff's injury.)

COMPLAINTS IN ACTIONS FOR CONVERSION OR OF REPLEVIN.

[Principal Cases, pp. 229, 277, this Vol.]

- (1) *The wrongful taking, detention, etc.*
- (2) —*Demand.*
- (3) *Description of the property.*
- (4) *Plaintiff's ownership or right of possession.*
- (5) *Damages, etc.*

- (1) *The wrongful taking, detention, etc.*

California.—*Bancroft Co. v. Haslett*, California, 1895, 39 Pac. Rep., 602. (Plaintiff need not prove the exact date of conversion as alleged. It is sufficient, if he shows that it took place before the commencement of the action.) *Carman v. Ross*, 64 Cal., 249; s. c. 29 Pac. Rep., 510. (Demurrer to a complaint in replevin sustained where it averred that plaintiff was in possession of the property.) *Visher v. Smith*, 91 Cal., 260; s. c. 27 Pac. Rep., 650. (Where complaint in replevin set forth defendant's warehouse receipts to deliver the goods on the surrender of the receipts, and alleged defendant's refusal to redeliver on demand without offering any excuse, held, that the complaint was not demurrable on the ground that it did not allege that at the commencement of the action defendants were in actual or constructive possession of the property.) *Indiana*.—*Gould v. O'Neal*, 1 Ind. App., 144; s. c. 27 N. E. Rep., 307. (An allegation that defendant "unlawfully holds" the property is equivalent to an allegation that it is "unlawfully detained.") *Ross v. Menefee*, 125 Ind., 432; s. c. 25 N. E. Rep., 545. (In an action for unlawful detention of a chattel, it is not necessary to allege that defendant unlawfully obtained possession.) *Turpie v. Fagg*, 124 Ind., 476; s. c. 22 N. E. Rep., 743. (Demurrer overruled to a complaint alleging that "plaintiffs are entitled to the posses-

sion of" the property "which defendant has possession of, without right, and unlawfully detains from the plaintiff.") *Town of Andrews v. Sellers*, Ind. App., 1894, 38 N. E. Rep., 1101. (In replevin against a town for property seized by defendant to satisfy a tax, complaint held demurrable for not alleging that the tax was illegal.) *Iowa*.—*Glover v. Narey*, Iowa, 1894, 60 N. W. Rep., 581. (In replevin against a sheriff for the wrongful seizure of plaintiff's property under several writs of attachment in different suits, plaintiff cannot be required to set out in separate counts what portion of the property claimed was taken under each writ.) *Massachusetts*.—*Duggan v. Wright*, 157 Mass., 228; 32 N. E. Rep., 159. (A declaration alleging that "defendant has converted to his own use" certain chattels "the property of plaintiff," is sufficient to admit proof of all the facts necessary to maintain an action of trover; since it is the form prescribed by Pub. St., C. 167, Sec. 94.) *Michigan*.—*Smith v. Thompson*, 94 Mich., 381; s. c. 54 N. W. Rep., 168. (In trover for conversion of shares of stock, the declaration need not allege that the shares had been indorsed so as to enable the defendants to transfer them, as it is not necessary to set forth how, or in what way, or by what means, the conversion was accomplished.) *Missouri*.—*Warnick v. Baker*, 42 Mo. App., 439. (Petition held to sufficiently state a cause of action for conversion, which alleged that the defendants "without leave, forcibly and wrongfully drove away" plaintiff's cattle, and have not returned the same.) *Nebraska*.—*McKinney v. First Nat. Bk.*, 36 Neb., 629; s. c. 54 N. W. Rep., 963. (In replevin against the transferee of a purchaser of goods, who obtained them under false pretences, it is sufficient for the complaint to allege that plaintiff is owner and entitled to the possession of the goods and that they are wrongfully detained by defendant, without any allegation as to how defendant acquired them. Defendant's purchase in good faith is a matter of defense.) *Eikenbary v. Clifford*, 34 Neb., 607; 52 N. W. Rep., 377. (Where petition alleged that the property "was not taken in execution on any order or judgment rendered against plaintiff, or for the payment of any tax," etc., held, that plaintiff could not introduce proof that the property was taken under execution, but that it was exempt, without amendment.) For approved forms of complaint in actions for conversion, etc., see: *Cortelyou v. Hiatt*, 36 Neb., 584; s. c. 54 N. W. Rep., 964. *Rodgers v. Graham*, 36 Neb., 730; s. c. 55 N. W. Rep., 243. *Johnson v. Neal*, 32 Neb., 14; s. c. 48 N. W. Rep., 897. *Nevada*.—*Gardner v. Brown*, Nevada, 1894; 87 Pac. Rep., 240. (In an action for the recovery of personal property or its value, where complaint alleges that defendant is in possession thereof, no recovery can be had unless plaintiff shows that defendant was in possession at the commencement of the action.) *New Jersey*.—*Lippman v. Myers*, 53 N. J. L., 21; s. c. 20 Atl. Rep., 1079. (A declaration may contain a count in trover and a count in trespass *de bonis asportatis*.) *New York*.—*Scofield v. Valentini*, 46 State Rep., 880; s. c. 19 N. Y. Supp., 225. (Complaint held to sufficiently show a wrongful detention, which alleged that plaintiff had a right to the possession of the chattel in case of a default in the payment of rent; that there had been a default; that plaintiff's lessee had transferred the chattels to defendant without plaintiff's consent, and

that a demand for their return had been refused. In such a case, it is not necessary to allege that defendant had knowledge of the agreement between plaintiff and lessee.) *Button v. Lusk*, 32 State Rep., 531; s. c. 10 N. Y. Supp., 582. (Complaint in replevin, in a justice's court, held to be sufficient, where the facts alleged showed a wrongful taking, though it did not expressly allege that the taking was wrongful.) *Gregory v. Fichtner*, 38 State Rep., 192; s. c. 27 Abb. N. C. 86; 14 N. Y. Supp., 891. (Complaint held sufficient, which alleged property in plaintiff, possession by defendant as bailee, the value of the property, and defendant's refusal to deliver the same on demand.) *Barry v. Calder*, 48 Hun, 449; s. c. 16 State Rep., 295. (Code Civ. Pro., sec. 1721, requiring complaint to state the facts showing the wrongful detention, applies only to actions of replevin, and not to actions for trover or conversion.) *South Carolina*.—*Nance v. Georgia C. & N. R. Co.*, 35 S. C., 307; s. c. 14 S. E. Rep., 629. (An allegation that defendant "unlawfully took possession of the said cross-ties and converted them to his own use," is not made on allegation of a conclusion of law by the use of the word "unlawfully.") *South Dakota*.—*Humpfner v. D. M. Osborne & Co.*, 2 S. D., 810; s. c. 50 N. W. Rep., 88. (Complaint held sufficient, which alleged that plaintiff was owner of the personal property, and that while it was in defendant's possession it wrongfully converted them to its own use to plaintiff's damage; and the further allegation that "defendant took possession of said personal property," should be disregarded.) *Wisconsin*.—*Van Oss v. Synon*, 85 Wis., 661; s. c. 56 N. W. Rep., 190. (Complaint regarded as setting forth a cause of action on contract, where it demanded a specific and liquidated sum of money which was retained by the defendants, as the plaintiff's attorneys, from moneys collected for her by them, and which they refused to pay over, and an allegation that defendants "have wrongfully converted the same to their own use," should be disregarded as immaterial.) *Wyoming*.—*Cone v. Iverson*, *Wyoming*, 1894, 35 Pac. Rep., 933; s. c. 33 Pac. Rep., 31. (A petition alleging that plaintiff held a mortgage on certain sheep, as defendant knew; that the mortgagors at defendant's instigation sold and disposed of all the sheep; and that defendant for the purpose of defrauding plaintiff collected and retained the proceeds of the sale,—alleges an unlawful sale in hostility to plaintiff's mortgage and therefore a tortious conversion by the parties making the sale.)

(2) — *Demand.*

Indiana.—*Sloan v. Lick Creek, etc., Gravel Road Co.*, 6 Ind. App., 584; s. c. 33 N. E. Rep., 997. (A complaint alleging that defendants collected certain money belonging to plaintiff, which they converted to their own use, and which they failed and refused to pay over to plaintiff, not only sufficiently alleges conversion but also demand.) *Missouri*.—*Knipper v. Blumenthal*, 107 Mo., 665; s. c. 18 S. W. Rep., 23. (No demand need be alleged, where the facts alleged show that defendant held the property as security and had wrongfully disposed of it.) *Nebraska*.—*Fletcher v. Cummings*, 33 Neb., 793; s. c. 51 N. W. Rep., 144. (In an action against an attorney to recover money collected by him for plain-

tiff, an averment in the petition that defendant neglected and refused to pay over the money though requested so to do, is a sufficient allegation of demand.) *New York*.—*Saratoga, etc., Light Co. v. Hazard*, 55 Hun, 251; s. c. 7 N.Y. Supp., 844; 27 State Rep., 588. (Although defendant came into possession of the property lawfully, no demand need be alleged, where it is alleged that defendant unlawfully converted and disposed of the property to his own use.) *Schmidt v. Garfield Nat. Bank*, 64 Hun, 298; s. c. 40 State Rep., 639; 19 N. Y. Supp., 252. (Complaint alleging plaintiff was owner of specific checks, and that defendant, a bank, without plaintiff's authority obtained possession of them, and wrongfully disposed of and converted them to its own use, is sufficient, in absence of a motion to make more definite and certain. In such case, it is not necessary to allege a demand for the checks.) *Ohio*.—*Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St., 489; s. c. 32 N. E. Rep., 476. (It is not necessary to allege a demand for the property by plaintiff, and defendant's refusal to deliver it to him, even where the property came lawfully into possession of defendant. The ultimate fact is the conversion, and that only need be pleaded.) *South Dakota*.—*Holdridge v. Lee*, 3 S. D., 134; 52 N. W. Rep., 265. (In an action to recover for the conversion of exempted property taken upon execution, complaint alleging the service of the statutory notice of claim of exemption upon sheriff is sufficient, without alleging other or different demand.) *Washington*.—*Hulbert v. Brackett*, 8 Wash., 438; s. c. 36 Pac. Rep., 264. (Amendment may be allowed at the trial by inserting an allegation of demand.)

(3) *Description of the property.*

California.—*Greenbaum v. Taylor*, 102 Cal., 624; s. c. 36 Pac. Rep., 957. (In an action of trover, a description of the property as "all the saloon fixtures on the premises No. 424 M. street;" giving city and county, held sufficiently certain.) *Georgia*.—*Leitner v. Strickland*, 89 Ga., 363; s. c. 15 S. E. Rep., 469. (In trover, the following description was held to be sufficiently certain, "That hewn timber, and those round logs, which were cut from the land of the petitioner, and from the land of A., by one B., and were by said B. left and deposited in the waters of the G. river, at a point not far from the bridge of the M. & A. R. R., and being that timber and logs referred to in the contract between petitioner and said B., dated," etc.) *Wolf v. Kennedy*, 93 Ga., 219; 18 S. E. Rep., 433. (In replevin, *held*, that it was not a ground for setting aside a judgment, that the property alleged to have been converted was vaguely and loosely described in the petition, and that some of it was stated to be the clothes of plaintiff's father.) *Idaho*.—*Pierce v. Langdon, Ida.*, 1891, 28 Pac. Rep., 401. (In replevin, *held*, that it was insufficient for complaint to describe the property as "590 sacks of wheat;" and that a verdict and judgment which referred only to "the property described in the complaint" giving value, were fatally defective.) *Indiana*.—*Wood v. Darnell*, 1 Ind. App., 215; 27 N. E. Rep., 447. (In replevin, *held*, that it was sufficient to describe property as "one gray horse, six years old this spring, about 16½ hands high, with a small knot about half way between the right nostril and the

right eye, near the front of face or nose, with collar mark on top of neck, dark mane and tail, with top end of tail light in color.") *Kentucky*.—*Sawyer v. Middlesborough Town Co.*, Kentucky, 1891, 17 S. W. Rep., 444. (In replevin, it is sufficient for plaintiff to describe the property taken as about "200 or 250 cubic yards of stone lying in the natural state, in oblong blocks.") *Maryland*.—*Crocker v. Hopps*, 78 Md., 260; s. c. 28 Atl. Rep., 99. (In trover, property held sufficiently described by an allegation that defendant converted "three horses, three carriages, and one set of double harness.") *Michigan*.—*Caldwell v. Bowen*, 80 Mich., 383; s. c. 45 N. W. Rep., 185. (The words "being an invoice * * * sold to E. T. A. & Co," after an allegation specifying the goods, held to be a mere description, and that proof that the goods were sold to E. T. A. was admissible.) *Nebraska*.—*Bilby v. Townsend*, 29 Neb., 220; s. c. 45 N. W. Rep., 619. (In replevin, allegation describing the property sought to be recovered as "two bay mares, five years old," without stating the names by which they were known, held supported by evidence as to two mares of certain names, and corresponding to the description given.) *Oregon*.—*Riley v. Pearson*, 21 Ore., 15; s. c. 26 Pac. Rep., 849. (In replevin, an exhibit containing a description of the property in order to become a part of the complaint must be annexed and attached thereto. It is not sufficient to file the same as a separate paper, although referred to in the complaint and alleged to be a part thereof.) *South Carolina*.—*Burr v. Brantley*, South Carolina, 1894, 19 S. E. Rep., 199. (In replevin, demurrer for insufficient description of the property overruled, where it was alleged that defendant seized upon plaintiff's premises four wagon loads of corn amounting to forty bushels, and 400 or 500 pounds of fodder, exempted from sale under the homestead law.) *Texas*.—*Schneider v. Ferguson*, 77 Tex., 572; s. c. 14 S. W. Rep., 154. (An allegation of inability to accurately describe the goods, held, not to excuse an insufficient description, where it is alleged that the goods were wrongfully attached, and it is not alleged that the return to the attachment writ had been lost, and that there was no description of the attached property among the records of the suit.)

(4) *Plaintiff's ownership or right of possession.*

California.—*Rosenthal v. McMann*, 93 Cal., 505; s. c. 29 Pac. Rep., 121. (Complaint alleging that plaintiff was entitled to possession, held to be sufficient to support a judgment for plaintiff, though it failed to allege ownership.) *Visher v. Smith*, 91 Cal., 260; 27 Pac. Rep., 650. (On demurrer, complaint in replevin held not objectionable on the ground that it did not expressly allege that plaintiff was the owner and entitled to possession of the property sought to be recovered, where facts are alleged showing him to be entitled to possession.) *Fredericks v. Tracy*, 98 Cal., 658; s. c. 33 Pac. Rep., 750. (Demurrer sustained to a complaint in an action for claim and delivery, which alleged that plaintiff was owner and entitled to immediate delivery of the property two days before the commencement of the action, and did not show that such facts continued to exist at the commencement of the action.) *Colorado*.—*Stevenson v. Lord*, 15 Colo., 131; s. c. 25 Pac. Rep., 318. (In replevin by a chattel mortgagee against

an attaching creditor of the mortgagor, an allegation of the non-payment of the mortgage is unnecessary.) *Idaho*.—*Pierce v. Langdon*, 2 Ida., 878; s. c. 28 Pac. Rep., 401. (An allegation that plaintiff was the owner and entitled to the possession of the property, held, sufficient after verdict.) *Indiana*.—*Rich. First Nat. Bank v. Gibbons*, 7 Ind. App., 629; s. c. 35 N. E. Rep., 31. (In an action by the payee of a draft for its conversion, it is not necessary for plaintiff to anticipate defenses by alleging that she did not indorse the draft, or that defendants did not purchase it in good faith, for value and before maturity. It is sufficient to allege that plaintiff was the owner, when the draft was converted.) *Kansas*.—*Kennett v. Peters*, 54 Kan., 119; s. c. 37 Pac. Rep., 999. (If plaintiff is not the absolute owner, the petition must set forth this special ownership or interest, stating the facts in relation thereto; and it must appear that plaintiff's interest existed at the time of the conversion.) *Massachusetts*.—*Duggan v. Wright*, 157 Mass., 228; s. c. 32 N. E. Rep., 159. (An allegation that the property converted was plaintiff's is supported by proof of a mortgage title in her.) *Michigan*.—*Warren v. Dwyer*, 91 Mich., 414; s. c. 51 N. W. Rep., 1062. (In trover, the declaration need not show the nature or evidence of plaintiff's title.) *Minnesota*.—*Miller v. Adamson*, 45 Minn., 99; s. c. 47 N. W. Rep., 452. (Plaintiff in replevin may allege generally, that he is owner and entitled to possession of the property, and under it, he may prove any right to the property, general or special, that entitles him to possession.) *Missouri*.—*Warrick v. Baker*, 42 Mo. App., 439. (An allegation referring to the property as "belonging to plaintiff," held to be a sufficient allegation of plaintiff's title which carried with it the possession.) *Montana*.—*Sawyer v. Robertson*, 11 Mont., 416; s. c. 28 Pac. Rep., 456. (Complaint held insufficient, which alleged that, on May 8th, plaintiff "was and now is" the owner of certain property, and that on or about May 12th, the defendant took and converted the property.) *Nebraska*.—*Reid v. McRill*, 41 Neb., 206; s. c. 59 N. W. Rep., 775. (It is sufficient to allege ownership generally without stating how such ownership was acquired.) *Kavanaugh v. Oberfelder*, 37 Neb., 647; s. c. 56 N. W. Rep., 316. (It is not necessary for plaintiff to trace in his petition the devolution of title to himself. Facts showing how he acquired the property may be proved under a general allegation of ownership.) *Musser v. King*, 40 Neb., 892; s. c. 59 N. W. Rep., 744. (Under a general allegation that plaintiffs were owners and entitled to immediate possession of a chattel, plaintiffs cannot prove a special ownership thereof by reason of a chattel mortgage. Facts showing such special ownership should have been pleaded.) *S. P. Randall v. Piersons*, Neb., 1894; s. c. 60 N. W. Rep., 898; *Sharp v. Johnson*, Neb., 1895, 62 N. W. Rep., 466. *New York*.—*Kerner v. Boardman*, 14 N. Y. Supp., 787; 39 State Rep., 787. (An allegation that "defendant wrongfully took into his possession property of which the plaintiff was owner," held to sufficiently allege plaintiff's right of possession.) *Washington*.—*Binnian v. Baker*, 6 Wash., 50; 32 Pac. Rep., 1008. (In an action by mortgagee against a subsequent mortgagee, held that it did not allege possession or right of possession or a demand of possession; since in Washington a chattel mortgage vests no title or right of possession in mortgagee.)

(5) *Damages, etc.*

Alabama.—*Ross v. Malone*, 97 Ala., 529; s. c. 12 So. Rep., 182. (Plaintiff cannot recover the expenses incurred in the prosecution of an action of detinue for the recovery of the property converted, unless he specially pleads such claim.) *Indiana*.—*Harlan v. Brown*, 4 Ind. App., 319; 80 N. E. Rep., 928. (In an action for the conversion of a note past due, and which the defendants were unable to restore, held that the value of the note was sufficiently alleged, where the complaint stated the date of the note, the principal and rate of interest. If the maker was insolvent, or there was a legal defense to the note, it could be shown by the way of defense.) *Bensch v. Farnsworth*, Ind. App., 1894, 37 N. E. Rep., 284. (In replevin in a justice's court, complaint may be amended so as to omit a claim for damages, in order to bring the action within the jurisdiction of the court.) *Kansas*.—*Bradley v. Borin*, 53 Kan., 628; 36 Pac. Rep., 977. (Special damages for loss of profits, not alleged in the petition, cannot be recovered.) *Michigan*.—*Riley v. Littlefield*, 84 Mich., 22; s. c. 47 N. W. Rep., 576. (Under the ordinary form of declaration in replevin, plaintiff may recover any damages to which he is entitled whether on account of unlawful taking or wrongful detention.) *New York*.—*Godard v. Cassell*, 84 Hun, 113; s. c. 31 N. Y. Supp., 1044. (Amendment, changing the form of action from replevin to trover allowed.) *North Carolina*.—*Kiger v. Harmond*, 113 N. C., 406; 18 S. E. Rep., 515. (A demand for possession of the property, and for judgment for the debt secured by it may be joined in an action of claim and delivery.) *Texas*.—*San Antonio & A. P. R. Co. v. Kniffin*, 4 Tex. Civ. App., 494; s. c. 23 S. W. Rep., 457. (An allegation claiming exemplary damages, held to be sufficient, which stated the act of conversion was done unlawfully, wantonly and maliciously, and with the fraudulent intent to deprive plaintiff of his property, without stating the circumstances to show that it was so done.)

COMPLAINTS IN ACTIONS FOR DECEIT.

[Principal Case, p. 239, this Vol.]

- (1) *Nature of the representations, etc.*
- (2) *The intent to deceive, etc.*
- (3) *Plaintiff's reliance upon defendant's representations.*
- (4) *Resulting damage, etc.*

(1) *Nature of the representations, etc.*

California.—*Hicks v. Thomas*. 90 Cal., 289; s. c. 27 Pac. Rep., 208, 376. (It is not necessary that complaint should minutely detail the conversations by which the fraudulent representations are proven.) *Connecticut*.—*Sprague v. Taylor*, 58 Conn., 542; s. c. 20 Atl. Rep., 612. (In an action by a client against his attorney for inducing him by collusion and false representations to settle a judgment, held, that facts sufficient to show the deceit having been alleged and proved, an allegation that defendant

was retained by plaintiff would be disregarded as immaterial.) *Illinois*.—*Kitson v. People*, 132 Ill., 327; s. c. 23 N. E. Rep., 1024. (A count in a declaration, alleging that defendant in order to induce the plaintiffs to sell him goods on credit, falsely and fraudulently represented that he intended to pay therefor, does not state sufficient facts to constitute a cause of action for deceit.) *Indiana*.—*Beem v. Lockhart*, 1 Ind. App., 202; s. c. 27 N. E. Rep., 239. (Allegations of fraudulent representations by defendants through their agent held sufficiently distinct.) *Kansas*.—*Culp v. Steere*, 47 Kan., 746; s. c. 28 Pac. Rep., 987. (In an action for false representation, held, that it was not error to allow an amendment to show that the wrongful representations included an express warranty. Such amendment, though it may change the form of action, does not substantially change the cause of action.) *Michigan*.—*Averill v. Wood*, 78 Mich., 342; 44 N. W. Rep., 381. (Under an allegation that defendant represented that he had made arrangements for the payment of notes with the receiver of the maker, evidence may be given that defendant told plaintiff that one of the notes had been accepted by the receiver.) *Leland v. Goodfellow*, 84 Mich., 357; s. c. 47 N. W. Rep., 591. (Demurrer to a declaration sustained, which alleged that the false representations were made by defendant's agent, but which failed to show defendant's complicity therein.) *New York*.—*Goldstein v. Parker*, 30 State Rep., 245; s. c. 8 N. Y. Supp., 865. (Complaint properly dismissed which merely alleged that defendant with the intent to deceive and defraud plaintiff entered into an agreement to sell a soda water business and executed a bill of sale therefor; "wherein and whereby" defendant fraudulently represented that certain fixtures were in good order, where the bill of sale annexed to complaint failed to show such misrepresentations.) *Genin v. Schwenk*, 41 State Rep., 883; s. c. 16 N. Y. Supp., 432. (Where complaint sufficiently shows a cause of action for the procuring of a loan from plaintiff upon false representation, it is not necessary that it should allege facts sufficient to bind defendant as an indorser in order to sustain recovery, although the allegations show that the loan was made on the promissory note of a third person to defendant's order and that defendant indorsed it to plaintiff.) *Oregon*.—*Corbett v. Wrenn*, Oregon, 1894, 35 Pac. Rep., 658. (Complaint properly construed as an action for breach of covenant, and not for deceit, which alleged that defendant sold land to plaintiff with the covenant against incumbrances; that defendant knowingly made false representations that it was clear from incumbrances, in reliance upon which plaintiff purchased; and that she subsequently was compelled to pay off a mortgage to secure title.) *Rhode Island*.—*Handy v. Waldron*, R. I., 1894, 29 Atl. Rep., 143. (A count alleging several false representations, as the subject matter of a sale whereby plaintiff was defrauded, does not show more than one cause for action.) *Fogarty v. Barnes*, 16 R. I., 627; s. c. 18 Atl. Rep., 982. (An action of trespass on the case, and not on the contract, may be brought against one who warranted a horse to be sound, knowing it to be unsound, although 2 Pub. L., Apr. 26, 1889, amending Pub. St. c. 225, § 1, provides, that, in actions of trespass on the case, defendant may be committed to close jail.)

(2) *The intent to deceive, etc.*

Massachusetts.—*Holst v. Stewart*, 154 Mass., 445 ; s. c. 28 N. E. Rep., 574. (Demurrer to declaration sustained on the ground that it did not allege that the representations were fraudulent as well as false.) *Brady v. Finn*, 162 Mass., 260 ; s. c. 38 N. E. Rep., 506. (A declaration, alleging that defendant knowingly made false representations of material facts by which plaintiff was induced to make an exchange of real estate, is sufficient since the jury may infer a fraudulent intent.) *Missouri*.—*Fenwick v. Bowling*, 50 Mo. App., 516. (Petition merely averring that the representations are untrue, without charging that they were knowingly and fraudulently made, — is bad.) *Redpath v. Lawrence*, 42 Mo. App., 101. (*Held*, that petition did not state a cause of action, where it did not allege defendant's intent to deceive, and contained only a general allegation of fraud.) *New York*.—*Thomas v. Snyder*, 77 Hun, 365 ; s. c. 60 State Rep., 415 ; 28 N. Y. Supp., 877. (Complaint cannot be regarded as setting forth a cause of action for false representations, which does not allege that defendants knew the representations to be false.) *Steinam v. Bell*, 7 Misc., 318 ; s. c. 57 N. Y. St. Rep., 462 ; 27 N. Y. Supp., 905. (Complaint alleging, that defendant warranted and falsely represented a mare to be sound ; that relying thereon plaintiff purchased the mare ; that the mare was unsound and known to defendant to be so ; and that in consequence of the animal's condition plaintiff was put to great expense, etc.,—states a cause of action for fraud, and not on contract.) *American Nat. Bank v. Grace*, 67 Hun, 432 ; s. c. 51 State Rep., 308 ; 22 N. Y. Supp., 121. (Motion to make more definite denied, where complaint, after fully setting forth the character of the fraud and deceit and false representations, alleged that defendant "was informed and knew of the facts and circumstances sufficient to charge him with knowledge of the falsity thereof.") *Oregon*.—*Britt v. Marks*, 20 Ore., 223 ; s. c. 25 Pac. Rep., 636. (Complaint must allege that defendant knew the representations relied on by plaintiff were untrue, and that they were made with the intent to defraud the plaintiff.) *Schoellhamer v. Rometsch*, Oregon, 1894, 38 Pac. Rep., 344. (Defendant's intent to deceive may be implied from an allegation, that he made specified representations, which he knew to be false, for the purpose of inducing, and which did induce, the plaintiff to purchase property to her damage.) *Pennsylvania*.—*Bradley v. Potts*, 155 Pa., 418 ; s. c. 26 Atl. Rep., 734. (It is not necessary that the fraud should be alleged in express terms, if the facts alleged are sufficient to support an inference of fraud.) *United States*.—*Shippen v. Bowen*, 48 Fed. Rep., 659. (Defendant's knowledge of the falsity of the representations must be alleged and proved.) *Barnes v. Union Pac. R. Co.*, 54 Fed. Rep., 87, C. C. A., 1893. (In an action for false representations as to defendant's title to land, complaint need not allege that, at the time of making the representations, defendant knew them to be false, where it appears that plaintiff had no knowledge of the title and relied wholly on defendant's statements.)

(3) *Plaintiff's reliance on defendant's representations.*

Georgia.—*Cheney v. Powell*, 88 Ga., 629; s. c. 15 S. E. Rep., 750. (Demurrer overruled, though complaint did not expressly allege that plaintiff was deceived by the fraudulent representations, where such fact was plainly implied by the facts alleged.) *Indiana*.—*Lincoln v. Ragsdale*, Indiana Appeals, 1894, 37 N. E. Rep., 25. (Demurrer to a complaint for fraudulent representations sustained, where it did not allege that plaintiff was ignorant of the falsity thereof, and that he was misled thereby.) *Massachusetts*.—*Windram v. French*, 157 Mass., 547; s. c. 24 N. E. Rep., 914. (A declaration, alleging that plaintiff indorsed a note relying on the validity of specified certificate of stock which had been illegally issued by defendants, but not alleging that he relied upon defendant's representations that the stock was valid, arising from their signing the certificate as officers—is sufficient as against a demurrer not specifically pointing out the defect; especially, where it was also alleged, that the certificate was issued by defendants to enable the person named in it to raise money.) *Wisconsin*.—*Sheldon v. Davidson*, 85 Wis., 138; s. c. 55 N. W. Rep., 161. (In an action for false representations that a barn on the premises was included in the lease which plaintiff was induced to make, complaint held demurrable, where it alleged, that plaintiff made inquiries as to defendant's ownership of the barn, but did not allege the result of the inquiries, nor that plaintiff was ignorant of the fact that defendant did not own the building.)

(4) *Resulting damage, etc.*

California.—*London, etc., Ins. Co. v. Liebes*, 105 Cal., 203; s. c. 38 Pac. Rep., 691. (Demurrer to complaint sustained on the ground that it did not show that plaintiff was damaged by defendant's alleged false representations.) *Nebraska*.—*Gilcrest v. Nantker*, Nebraska, 1894, 60 N. W. Rep., 906. (Petition is fatally defective, if it fails to allege what damage was sustained by plaintiff by reason of the alleged false representations.) *New York*.—*Wilson v. Ryder*, 10 N. Y. Supp., 233. (In an action of procuring goods by defendant's false representations that he owned property of a specified value free and clear of liabilities, complaint dismissed for failing to allege that plaintiff was damaged by such misrepresentation.) N. Y. Land Imp. Co. v. Chapman, 118 N. Y., 288; s. c. 23 N. E. Rep., 187. (Complaint held to state a good cause of action, which alleged, in effect, that plaintiff had a right to dispossess a firm of which defendant was a member for non-payment of rent, but that upon defendant's representation that the firm was solvent, which defendant knew to be false, plaintiff allowed the firm to remain, and refused to rent to others; and that in consequence of the firm's insolvency, plaintiff lost rent.) *Whitner v. Perlhacs*, 25 Abb. N. C., 130; s. c. 11 N. Y. Supp., 756. (A complaint for damages for false representations, in inducing plaintiff to purchase stock in a certain corporation, and to render services to it, states but a single cause of action having two items of damage.)

COMPLAINTS IN ACTIONS FOR FALSE IMPRISONMENT.

[Principal Case, p. 241, this Vol.]

Alabama.—Rich v. McInnery, Alabama, 1894, 15 So. Rep., 663. (Under the Alabama Code, a complaint substantially in the following form is sufficient: "The plaintiff claims of the defendant — dollars as damages for maliciously and without probable cause therefor, arresting and imprisoning this plaintiff [or, causing this plaintiff to be arrested and imprisoned] on the charge of larceny [or, other felony as the case may be] for — days, viz., on the — day of —.") *California*.—Going v. Dinwiddie, 86 Cal., 633; s. c. 25 Pac. Rep., 129. (A complaint, alleging that defendant, a justice of the peace, imprisoned plaintiff "unlawfully and with force and without probable cause," on a pretended charge of contempt of court for disobedience to a writ of restitution, "wrongfully and unlawfully" issued by him, held, insufficient in not alleging facts to show that defendant acted in excess of his powers as justice.) *Illinois*.—Sundmacker v. Block, 39 Ill. App., 553. (Where the arrest is alleged to have been made by a private person without process, it is not necessary to allege that the arrest was made without reasonable or probable cause.) *Indiana*.—Sanford Tool & F. Co. v. Mullen, 1 Ind. App., 204; s. c. 27 N. E. Rep., 448. (It is not error to allow an amendment of complaint to conform it to evidence, when the only change relates to the crime on which the alleged imprisonment was based.) *Mississippi*.—Anderson v. Beck, 64 Miss., 113; s. c. 8 So. Rep., 167. (Complaint held not demurrable, which alleged that defendant, a Sheriff, by virtue of his office, imprisoned plaintiff for more than 30 days on a pretended warrant for his arrest, on a false and fraudulent charge; since such a detention under a warrant would be illegal without a mittimus.) *New York*.—Cunningham v. East River Electric Light Co., 42 State Rep., 212; s. c. 17 N. Y. Supp., 372. (The unlawfulness of the arrest must be alleged. It is not sufficient merely to allege that it was maliciously procured.) *Oregon*.—Nemitz v. Conrad, 22 Ore., 164; s. c. 29 Pac. Rep., 548. (Plaintiff cannot recover by showing that the imprisonment was unlawful because of a refusal to receive bail on a lawful arrest, where such facts are not pleaded.) *Texas*.—Landrum v. Wells, Texas Civ. App., 1894, 26 S. W. Rep., 1001. (Complaint held to be bad on special demurrer, which asked damages for the interruption of plaintiff's business, without stating what his business was.) Landrum v. Wells, *supra*. (In action against a constable and his bondsmen, the special demurrer of the bondsmen was sustained to a petition, alleging that the arrest was made under "color of office," but not setting out the process, or authority, under which the arrest was made.) *Wisconsin*.—King v. Johnston (Weed), 81 Wis., 578; s. c. 51 N. W. Rep., 1011. (Complaint held to be demurrable, which alleged that the arrest was made under a warrant, but failed to allege facts showing that it was extrajudicial, or illegal.)

COMPLAINTS IN ACTIONS FOR MALICIOUS PROSECUTION.

[Principal Case, p. 244, this Vol.]

- (1) *Malice, want of probable cause, etc.*
- (2) *Termination of the malicious proceedings in plaintiff's favor.*
- (3) *Damages, etc.*

(1) *Malice, want of probable cause, etc.*

Georgia.—Horn v. Sims, 92 Ga., 421; s. c. 17 S. E. Rep., 670. (The ending of the prosecution is sufficiently alleged by an allegation that the grand jury had made a return of no bill upon a bill of indictment, and expressed in their finding that the prosecution was malicious.) Hyfield v. Bass Furnace Co., 89 Ga., 827; s. c. 15 S. E. Rep., 752. (Demurrer to a declaration sustained which merely alleged that defendant was indebted to plaintiff for expenses incurred in defense of a suit brought by defendant against him without cause, a copy of which account is hereto attached and made a part of the petition; there being no description of the suit referred to, no allegation that it was maliciously brought, nor that it had terminated in plaintiff's favor.) *Indiana*.—Darnell v. Sallee, 7 Ind. App., 581; s. c. 34 N. E. Rep., 1020. (Complaint held not to show probable cause for the prosecution by alleging that plaintiff was bound over by the committing magistrate to await the action of the grand jury and that on the failure of the jury to indict he was discharged by order of the court.) Swindell v. Houck, 2 Ind. App., 519; s. c. 28 N. E. Rep., 736. (A complaint alleging that the action was commenced by affidavit and *capias* made maliciously and without probable cause, need not also allege that the writ upon which the arrest was made was procured maliciously and without probable cause.) Cottrell v. Cottrell, 126 Ind., 181; s. c. 25 N. E. Rep., 925. (As against demurrer, complaint held sufficient, which alleged that defendant maliciously and without probable cause procured plaintiff to be arrested on a warrant, and brought before a justice of the peace upon a charge of kidnapping, and that the plaintiff was acquitted and discharged by such justice.) *Kentucky*.—Duncan v. Griswold, 92 Ky., 546; s. c. 18 S. W. Rep., 354. (In an action for the malicious prosecution of a civil proceeding, whereby a cloud is cast on plaintiff's title to land, the petition must contain an averment of want of probable cause.) *Minnesota*.—O'Neill v. Johnson, 53 Minn., 439; s. c. 55 N. W. Rep., 601. (An action will lie for the malicious prosecution of a civil action, and a complaint in such an action is sufficient which alleges that defendant's action against plaintiff was instigated maliciously and without probable cause, and that plaintiff was not indebted to defendant in any sum, which defendant well knew; also the termination of the action and the plaintiff's damage.) *Missouri*.—Witascheck v. Glass, 46 Mo. App., 209. (In an action for malicious attachment, petition is fatally defective, if it fails to allege the want of probable cause.) *Nebraska*.—Obernalte v. Johnson, 36 Neb., 772; s. c. 55 N. W. Rep., 220. (Held, that it was error not to grant a motion to strike out from petition a special finding of the jury in

the criminal action, "that the complaint was made without probable cause.") *North Carolina*.—*Ely v. Davis*, 111 N. C., 24; s. c. 15 S. E. Rep., 878. (Complaint dismissed which failed to allege the want of probable cause, or facts from which it could be inferred.) *Davis v. Terry*, 114 N. C., 27; s. c. 18 S. E. Rep., 947. (A counterclaim for the malicious prosecution of a prior action, which fails to allege facts showing want of probable cause in instituting the action is bad.) *Rhode Island*.—*Hobbs v. Ray*, 18 R. I., —; s. c. 25 Atl. Rep., 694. (Trespass on the case is the proper form of action for malicious prosecution.) *Washington*.—*Jones v. Jenkins*, 8 Wash., 17; s. c. 27 Pac. Rep., 1022. (Where a complaint alleged in one paragraph that defendants procured plaintiff's arrest on a "false charge," stating it, and in another paragraph that in procuring such arrest and prosecution they acted "maliciously and without probable cause," held, that the complaint sufficiently alleged malice, want of probable cause, and the falsity of defendant's charge.)

(2) *Termination of the malicious proceedings in plaintiff's favor.*

Maryland.—*Clements v. McCracken*, Maryland, 1890, 20 Atl. Rep., 184. (Demurrer sustained to a declaration which alleged that defendant falsely and maliciously and without probable cause sued plaintiff upon a bond which he knew to have been forged, but not averring that such suit terminated in a judgment defeating a recovery on the bond.) *Michigan*.—*Peterson v. Toner*, 80 Mich., 350; s. c. 45 N. W. Rep., 346. (Held, that plaintiff need only prove that he was acquitted by the verdict of a jury and discharged out of custody, and that other matters alleged in relation thereto were to be regarded as mere recitals.) *Missouri*.—*Boogher v. Hough*, 99 Mo., 183; s. c. 12 S. W. Rep., 524. (Where petitioner showed that plaintiff was convicted and that his conviction was reversed upon appeal, held, that the presumption that the prosecution was instituted upon probable cause was sufficiently rebutted by an allegation that the conviction was procured by fraud in depriving plaintiff of the testimony of his principal witness by joining him as co-indictee; and that it was not necessary to also allege that plaintiff was thereby prevented from making a defense.) *Freymark v. McKinney Bread Co.*, 55 Mo. App., 435. (In an action for malicious attachment, petition must either allege a termination of the proceeding in plaintiff's favor, or that it has terminated against him, and that he had no opportunity to defend against it.) *New York*.—*Scholl v. Schnebel*, 8 N. Y. Supp., 855; 29 State Rep., 676. (An allegation that the magistrate did acquit plaintiff of a charge of forgery, held sufficient without amendment, as the magistrate could only take an examination on such a charge, and a discharge, whether after testimony was given or without testimony, was an acquittal.) *North Carolina*.—*Sneed v. Harris*, 109 N. C., 349; s. c. 13 S. E. Rep., 920. (When an action is for the malicious abuse of legal process, in order to compel a party to do a collateral thing or to accomplish an ulterior purpose, it is not necessary to allege that the process improperly employed is at an end.) *Rhode Island*.—*Collins v. Campbell*, Rhode Island, 31 Atl. Rep., 832. (Demurrer to complaint sustained which failed to state positively that the malicious

proceedings terminated in plaintiff's favor.) *South Carolina*.—Tisdale v. Kingman, 84 S. C., 326; s. c. 13 S. E. Rep., 547. (Demurrer sustained on the ground that complaint did not show that the alleged malicious prosecution terminated in plaintiff's favor.) *Wisconsin*.—King v. Johnston (Weed), Wisconsin, 1892, 51 N. W. Rep., 1011. (Complaint held demurrable which failed to show that the criminal action had been determined.) Lawrence v. Cleary, 88 Wis., 473; s. c. 60 N. W. Rep., 793. (Petition held demurrable which showed that plaintiff pleaded guilty in the criminal action, and did not allege anything to show that the judgment therein was procured by defendant's fraud.)

(3) *Damages, etc.*

New York.—Cumber v. Schoenfeld, 84 N. Y. St. Rep., 770; s. c. 12 N. Y. Supp., 282. (A complaint seeking to recover for malicious prosecution only, held not amendable so as to allow for recovery for false imprisonment.) *South Dakota*.—Jackson v. Bell, South Dakota, 1894, 58 N. W. Rep., 671. (Held, that plaintiff is entitled to recover for injury to his feelings without specially pleading such injury, where it appears to be the ordinary and natural consequence of the acts set out in the complaint and proved without objection at the trial.)

COMPLAINTS IN ACTIONS FOR LIBEL OR SLANDER.

[Principal Case, p. 251, this Vol.]

- (1) *Extrinsic facts, inducement, averment, colloquium, etc.*
- (2) *Publication, utterance, etc.*
- (3) *The defamatory words.*
- (4) *Innuendo.*
- (5) *The falsity of the words or publication, malice, etc.*
- (6) *Damages.*

(1) *Extrinsic facts, inducement, averment, colloquium, etc.*

California.—Harris v. Zanone, 93 Cal., 59; s. c. 28 Pac. Rep., 845. (Demurrer properly overruled, to a complaint alleging that defendant in the presence and hearing of divers persons "spake the following words of and concerning plaintiff: 'She is a damned thief,'" though there was no averment that the words were understood by those who heard them to refer to plaintiff.) *Colorado*.—Craig v. Pueblo Press Co., Colo. App., 1894, 37 Pac. Rep., 945. (It seems, that even where the person against whom a libelous charge is made is so ambiguously described, that without aid of extrinsic facts his identity cannot be ascertained, it is sufficient to allege generally, that it was published concerning plaintiff, without other averment to connect him with the libel.) *Georgia*.—Hardy v. Williamson, 86 Ga., 551; s. c. 12 S. E. Rep., 874. (Complaint held not demurrable, though the defamatory words set out therein referred only to a class of persons to which plaintiff belonged, where it was alleged that the words

referred to plaintiff.) *Illinois*.—Doan v. Kelley, 121 Ill., 418; s. c. 23 N. E. Rep., 266. (Allegation that a publication referring to Louise K., was published concerning the plaintiff, is sufficient, though plaintiff sues as Laney K.) *McLaughlin v. Fisher*, Ill., 1890, 24 N. E. Rep., 60. (If the words alleged to have been spoken are not slanderous *per se*, they cannot be made so by an innuendo, where the extrinsic facts rendering the words slanderous have not been alleged by the way of inducement.) *Indiana*.—Emig v. Daum, 1 Ind. App., 146; s. c. 27 N. E. Rep., 322. (Demurrer sustained on the ground that the alleged words spoken were not properly connected by a colloquium with the facts necessary to make them slanderous, and that such facts could not be supplied by the way of innuendo.) *Casand v. Lee*, Ind. App., 1894, 38 N. E. Rep., 1099. (Where the alleged slanderous words are capable of conveying the meaning claimed for them, and also equally capable of conveying some other, and innocent meaning, it should not only be shown by innuendo that the words were spoken in a slanderous sense, but it should also be alleged that they were also understood in that sense.) *Kentucky*.—Hargan v. Purdy, 93 Ky., 424; s. c. 20 S. W. Rep., 432. (Complaint held demurrable where the alleged libel concerned plaintiff as a physician and the petition showed that he had no authority to practice medicine within the State.) *Maryland*.—Huffer v. Miller, 74 Md., 454; s. c. 22 Atl. Rep., 205. (Declaration held not demurrable which alleged the defamatory words to be, that plaintiff "swore to damn lies before Justice B., and that was the reason he [plaintiff] was acquitted," although it was not set forth in the colloquium that the words were spoken of plaintiff in connection with his trial before the justice named.) *Massachusetts*.—Clarke v. Zettick, 153 Mass., 1; s. c. 26 N. E. Rep., 234. (Demurrer overruled, where declaration alleged sufficient extrinsic facts from which it might be inferred that by the alleged words spoken a charge of forgery was intended; since, under Pub. St. C. 167, sec. 91, it was unnecessary, if not improper, to expressly allege by the way of innuendo, that the defendant meant that plaintiff had committed forgery.) *Michigan*.—Simons v. Burnham, Michigan, 1894, 60 N. W. Rep., 476. (An innuendo cannot impute to unambiguous words a meaning different from their ordinary import, where there is nothing alleged by the way of inducement to show that they were used and intended to be understood in any other than their ordinary sense.) *Minnesota*.—Glatz v. Theim, 47 Minn., 278; s. c. 50 N. W. Rep., 127. (Demurrer overruled, where allegations were sufficient to show that the language employed by defendant, although apparently harmless, was intended to have a covert libelous meaning, and was so understood.) *Carlson v. Minn. Tribune Co.*, 47 Minn., 337; 50 N. W. Rep., 229. (Demurrer sustained on the ground that complaint did not allege that plaintiff was the unnamed woman mentioned in the libelous article.) *Cady v. Minneapolis Times Co.*, Minn., 1894, 59 N. W. Rep., 1040. (Demurrer overruled, where complaint alleged that plaintiff was the person intended in the article complained of, and the other allegations did not negative such fact.) *Missouri*.—Powell v. Crawford, Missouri, 1891, 17 S. W. Rep., 1007. (If the words attributed to defendant are not slanderous *per se*, the colloquium must show that they were used in a connection and sense to make them slanderous; and this cannot be shown

by innuendo.) *S. P. Unterberger v. Scharff*, 51 Mo. App., 102. *New York*.—*Mattice v. Wilcox*, 13 New York Supp., 330; s. c. 36 State Rep., 914. (Complaint held sufficient which after setting out the alleged libelous matter alleged that such libel "referred to and meant plaintiff.") *Wellman v. Sun Print. & Pub. Ass'n*, 66 Hun, 381; s. c. 21 N. Y. Supp., 577. (Demurrer sustained where the alleged libel only showed a libel on plaintiff's deceased wife, though it was alleged that the article was published concerning the plaintiff.) *Oregon*.—*Cole v. Neustadter*, 23 Or., 191; s. c. 29 Pac. Rep., 550. (Demurrer sustained, where the words of the alleged libel were unambiguous, and there was nothing alleged by the way of inducement to show that the language used could have the libelous signification averred in the innuendo.) *Vermont*.—*Posnett v. Marble*, 63 Vt., 481; s. c. 20 Atl. Rep., 818. (No prefatory averment is necessary, where the alleged defamatory words themselves support the innuendo that plaintiff was engaged in a criminal occupation.) *Wisconsin*.—*Benz v. Wiedenhoef*, 83 Wis., 397; s. c. 58 N. W. Rep., 686. (Complaint held demurrable in which no fact was alleged by the way of inducement to show that the words, not actionable in themselves, had a slanderous meaning; and that complaint could not be sustained merely upon the imputations supplied by the way of innuendo.) *Karger v. Rich*, 81 Wis., 177; s. c. 51 N. W. Rep., 424. (Complaint held sufficient, where the words taken in connection with the matter alleged by the way of inducement imputed a crime, though the words were not of themselves actionable.)

(2) *Publication, utterance, etc.*

New York.—*Thomas v. Smith*, 75 Hun, 573; 27 N. Y. Supp., 589. (*Held*, that it was error to dismiss complaint at the trial, which after setting forth the libel, and alleging its falsity, alleged that the libelous statements were made by defendant to be published, and that they had been published as intended by him.) *Turner v. Beaven*, 28 Abb. N. C., 432; s. c. 10 N. Y. Supp., 128. (Plaintiff required to give bill of particulars giving the name of at least one person present on each occasion on which the alleged slander was uttered.) *Vermont*.—*Wilcox v. Moon*, 63 Vt., 481; s. c. 23 Atl. Rep., 80. (Allegation that defendant "composed and published certain false, scandalous and defamatory matter of and concerning plaintiff" without showing the manner of publication or to whom the communication was made, held sufficient averment of publication, though the libelous article set forth was apparently addressed to plaintiff only.) *Wisconsin*.—*Street v. Johnson*, 80 Wis., 445; s. c. 50 N. W. Rep., 895. (In action against one selling a paper containing a libelous article, complaint sustained on demurrer, which alleged a wilful and intentional sale of the paper by defendant without alleging that the defendant knew that the paper contained the libelous article.)

(3) *The defamatory words.*

Georgia.—*White v. Parks*, 93 Ga., 633; s. c. 20 S. E. Rep., 78. (Failure to copy libel in the declaration, or to set forth its exact words, is only bad

pleading in matter of form, and will be disregarded upon a general demurrer. Such a defect must be pointed out by special demurrer. (*Indiana*.—*Branaman v. Hinkle*, *Indiana*, 1894, 37 N. E. Rep., 546. (Demurrer sustained, because the language employed in the alleged libelous writing was not set forth.) *S. P. Small v. Fisher*, 2 Ind. App., 426; s. c. 28 N. E. Rep. 714. *Kentucky*.—*Hargan v. Purdy*, 93 Ky., 424; s. c. 20 S. W. Rep., 432. (Plaintiff may unite two causes of action for libels published at different times, though practically of the same import, and he cannot be required to elect between them at the trial.) *Michigan*.—*Randall v. Gartner*, 96 Mich., 284; s. c. 55 N. W. Rep., 848. (Plaintiff may join in one action several causes of action against defendant for distinct libels published on different occasions). *Minnesota*.—*Irish-Am. Bank v. Bader*, Minn., 1894, 41 N. W. Rep., 328. (In an action for slander, held that proof of different words from those alleged, although conveying the same general idea, was not sufficient.) *Mississippi*.—*Fritz v. Williams*, Miss., 1894, 16 So. Rep., 359. (It is sufficient to prove synonymous words conveying the same specific idea as the words alleged.) *Missouri*.—*Walter v. Hoeffner*, 51 Mo. App., 46. (Distinct defamatory statements imputing the same offense to plaintiff, but couched in different phraseology, and not appearing to have been spoken to the same persons need not be embraced in one count, and, if plaintiff alleges each statement in separate counts, he cannot be required at the trial to elect on which one he will proceed.) *Unterberger v. Scharff*, 51 Mo. App., 102. (It is sufficient, if plaintiff prove enough of the exact words charged in the petition, or substantially the same words, containing the gravamen of the charge.) *New York*.—*Germ Proof Filter Co. v. Pasteur-Chamberland Filter Co.*, 81 Hun, 49; s. c. 62 State Rep., 562; 30 N. Y. Supp., 584. (Complaint dismissed on the ground that it did not set out the particular words spoken by defendant.) *Enos v. Enos*, 135 N. Y., 609; s. c. 32 N. E. Rep., 123. (The words set forth as constituting the slander must be proved in substance, and different words, although imputing the same charge, but in entirely different language, will not support the complaint.) *Miller v. Holmes*, 19 N. Y. Supp., 701. (Held an immaterial variance where it was alleged, that defendant had said that plaintiff robbed him of \$400, and the proof tended to show that defendant said that plaintiff had robbed him of \$1,200.) *Cassidy v. B'klyn Eagle*, 18 N. Y. Supp., 930; s. c. 46 State Rep., 384. (Where the alleged words were libelous *per se*, evidence of other publications were admitted in evidence to explain their meaning, though not pleaded.) *Ronnie v. Ryder*, 8 N. Y. Supp., 5. (Complaint will not be dismissed, if there is a doubt whether the slanderous words imputed unchastity.) *Holmes v. Jones*, 50 Hun, 345; s. c. 20 N. Y. S. R., 175. (A complaint setting out different portions of the same publication in separate paragraphs, held to contain but one count, and that plaintiff was entitled to recover on a general verdict, though weight of evidence showed a justification as to the matter alleged in one of the paragraphs.) *North Carolina*.—*Gudger v. Penland*, 108 N. C., 598; s. c. 13 S. E. Rep., 168. (Though repetitions of utterances of slanderous words of like import may be counted on separately, it is not necessary that a separate demand for damages should be appended to each count.) *Rhode Island*.—*Kenyon v. Cameron*, 17 R. I., 122; s. c. 20, Atl.

Rep., 233. (Declaration held to be fatally defective, which did not set forth the alleged slanderous words, or their substance.) *Texas*.—*Brown v. Durham*, 3 Tex. Civ. App., 244; s. c. 22 S. W. Rep., 868. (As against a general demurrer, petition held to be good, which alleged in a general way, that plaintiff was published as a dishonest man who would not pay his debts, and reference was made to exhibits, and all the statements and intimations therein characterized as false.) *Nettles v. Somervell*, 6 Tex. Civ. App., 627; s. c. 25 S. W. Rep., 658. (In an action for libel, an amendment setting out other libelous statements of like import, and published at the same time as those alleged in the original petition, held not to state a new cause of action, but to merely make more definite, and to elaborate, the original cause of action.) *Wisconsin*.—*Schild v. Legler*, 82 Wis. 73; s. c. 51 N. W. Rep. 1099. (Held, that there was no variance, where complaint set forth the alleged slanderous words in a foreign language, and the English translation thereof, and there was no proof of the foreign words used, but only of the English equivalents as alleged.)

(4) *Innuendo*.

Colorado.—*Republican Pub. Co. v. Miner*, 3 Colo. App., 568; s. c. 34 Pac. Rep., 485. (Where article is absolutely libelous, the innuendo may be disregarded.) *Illinois*.—*Ulery v. Chic. Livestock Exch.*, 54 Ill. App., 233. (An innuendo cannot perform the office of a colloquium, nor can it extend the meaning of defamatory matter, unless by reference to matter of inducement.) *Michigan*.—*Sanford v. Rowley*, 93 Mich., 119; s. c. 52 N. W. Rep., 1119. (Where the meaning of the alleged libelous language is clear, an innuendo will be treated as surplusage.) *S. P. Randall v. Evening News Ass'n*, Mich., 1890, 44 N. W. Rep., 783. *Belknap v. Ball*, 83 Mich., 583; s. c. 47 N. W. Rep., 674. (Demurrer overruled, where [declaration alleged that defendant's newspaper falsely and maliciously reported plaintiff, a congressional candidate, as saying in a speech, that he would refrain from discussing the tariff question because "he wasn't built that way," meaning that the plaintiff was too ignorant and imbecile to discuss said question, or to express in a decent way his intention not to discuss it.) *Minnesota*.—*Frederickson v. Johnson*, Minnesota, 1895, 62 N. W. Rep., 388. (In an action for slander, held that an innuendo was surplusage, where the alleged words were unambiguous.) *Missouri*.—*McGinnis v. Geo. Knapp & Co.*, Mo., 1892., 18 S. W. Rep., 1134. (Though the innuendos cannot extend the meaning of the alleged defamatory words beyond their natural import, the imputed meaning may be considered in connection with the alleged extrinsic facts and circumstances in determining the meaning of the words upon demurrer.) *Callahan v. Ingram*, 122 Mo., 355; s. c. 26 S. W. Rep., 1020. (Innuendo disregarded, and not required to be proved, which charged that defendant meant by calling plaintiff a "downright thief" to charge that he was guilty of official corruption; since the words themselves were actionable without the innuendo.) *New York*.—*Turton v. N. Y. Recorder Co.*, 144 N. Y., 144; s. c. 38 N. E. Rep., 1009. (No innuendo necessary where the alleged article is libelous *per se*.) *Hemmens v. Nelson*, 138 N. Y., 517; 20 L. R. A.,

440; s. c. 58 N. Y. St. Rep., 94; 84 N. E. Rep., 342. (Where the alleged words were, that plaintiff "was in the habit of entertaining gentlemen callers at all hours of the night," held that the complaint was insufficient without an innuendo or allegation of some kind, that they were used in an actionable sense.) *Barnard v. Press Pub. Co.*, 17 N. Y. Supp., 573. (Motion to strike out innuendos properly denied, where the alleged libel was ambiguous.) *Pennsylvania*.—*Price v. Conway*, 134 Pa., 340; s. c. 19 Atl. Rep., 687. (Demurrer overruled, where the alleged libelous article was capable of bearing the actionable meaning imported by the innuendo.) *Texas*.—*Democrat Pub. Co. v. Jones*, 83 Tex., 802; s. c. 18 S. W. Rep., 652. (Complaint held not demurrable, where the alleged libelous article was capable of the construction given it by the innuendoes.) *Schulze v. Jalonick*, Texas C. A., 1895, 29 S. W. Rep., 198. (The alleged libelous articles gave plaintiff's name as the owner of several buildings, and stated that one of the buildings was occupied by a "blind tiger." Held, that such article supported the innuendo, that it was intended to charge that plaintiff was engaged in the unlawful sale of liquor.) *United States*.—*Mitchell v. Sharon*, 51 Fed. Rep., 424. (Demurrer overruled, where the alleged slanderous words, although they did not technically charge a crime, were capable of being so construed, and the innuendo imputed to them such a meaning.) *Viedt v. Evening Star Newspaper Co.*, 19 D. C., 534. (An innuendo cannot enlarge meaning of libelous words published.) *Vermont*.—*Wilcox v. Moon*, 63 Vt., 481; s. c. 22 Atl. Rep., 80. (Demurrer should be overruled, where defendant's alleged words alone, or in connection with explanatory facts alleged, are such as to support an innuendo imputing a charge of crime.)

(5) *The falsity of the words or publication, malice, etc.*

California.—*Harris v. Zanone*, 93 Cal., 59; s. c. 28 Pac. Rep., 845. (In an action for slander in uttering words actionable *per se*, an allegation that they were false implies malice, and plaintiff need not expressly allege malice, or prove it in the first instance.) *Kentucky*.—*Schulten v. Bavarian Brew. Co.*, Ky., 1894, 28 S. W. Rep., 504. (Complaint held to be demurrable in not sufficiently alleging the falsity of the alleged libelous statement.) *Indiana*.—*Henry v. Moberly*, 6 Ind. App., 490; s. c. 33 N. E. Rep., 981. (Complaint held to be insufficient on demurrer for not alleging that the alleged libelous words contained in a written protest, filed with school trustees, against the employment of plaintiff as a teacher, were published maliciously and without probable cause, and that it was not enough to allege that the language employed was false, malicious and libelous.) *Maryland*.—*Bottomly v. Bottomly*, 80 Md., 159; s. c. 30 Atl. Rep., 706. (Complaint demurrable, which fails to allege that the words complained of were false.) *New York*.—*Germ Proof Filter Co. v. Pasteur Chamberland Filter Co.*, 81 Hun, 49; s. c. 62 State Rep., 572; 80 N. Y. Supp., 584. (Where the alleged slander consisted in defendants saying, that plaintiff's goods were not patented, held, that the complaint was insufficient, in that it did not allege that the goods were patented, and that an allegation, that defendant falsely said that the plaintiff had no patent, was not equivalent to an allegation that plaintiff held a patent.) *Texas*.

—Democratic Pub. Co. v. Jones, 83 Tex., 302; s. c. 18 S. W. Rep., 652. (Demurrer overruled, where the alleged libel was naturally susceptible of the construction given by the innuendos, and expressly denied its truth.) *Wisconsin*.—Born v. Rosenow, 84 Wis., 620; s. c. 54 N. W., 1089. (Complaint sustained, as against an oral demurrer interposed at the trial, although it did not aver in the charging part, that the words alleged were false or defamatory, but merely averred such facts generally in the conclusion.)

(6) *Damages.*

Massachusetts.—Morasse v. Brochu, 151 Mass., 567; s. c. 25 N. E. Rep., 74. (Allegation that by reason of the slanderous words spoken of plaintiff, a physician, by defendant, a priest, church members and other persons refused to employ plaintiff, held to be sufficient in absence of demurrer pointing out defect, or an application for a statement of particulars, though the names of the persons who refused employment were not specified.) *Michigan*.—Henkle v. Schaub, 94 Mich., 542; s. c. 54 N. W. Rep., 293. (Special damages need not be alleged if the words set forth are actionable *per se*.) *Minnesota*.—Clementson v. Minn. Trib. Co., 45 Minn., 303; s. c. 47 N. W. Rep., 781. (In an action for libel against a newspaper, failure to allege the service of notice required by Gen. L., 1889, c. 131 upon defendant before action does not render complaint demurrable, where it alleges and claims actual or special damages as well as general damages.) *Mississippi*.—McLean v. Warring, Miss., 1893, 13 So. Rep., 236. (In an action under Miss. Code, 1880, sec. 1004, making insulting words actionable, special damages need not be alleged or proven.) *Nebraska*.—Pokrok Za Kadu Pub. Co. v. Ziskovsky, Neb., 1894, 60 N. W. Rep., 358. (Special damages need not be alleged, or proved, where it is charged that the written or printed statement made by defendant falsely and maliciously accuses plaintiff of the commission of an indictable offence.) Barr v. Birkner, Neb., 1895, 62 N. W. Rep., 494. (Special damages need not be alleged or proved in an action for slander for stating that plaintiff was a prostitute.) *New York*.—Fitzgerald v. Geils, 84 Hun, 295; s. c. 32 N. Y. Supp., 306. (Special damages need not be alleged if the words are actionable *per se*.) Flatow v. Von Bremsen, 19 Civ. Pro., R. 125; s. c. 11 N. Y. Supp., 680. (Special damage held, on demurrer, to be insufficiently alleged by an allegation, "that by reason of the speaking and uttering of the said words as aforesaid by defendant, divers persons have refused to associate or transact business with this plaintiff, and this plaintiff was, therefore, deprived of the benefits which would accrue to him from such association and business aforesaid, to his damage in the sum of \$1000.") S. P. Erwin v. Dezell, 64 Hun, 391; s. c. 19 N. Y. Supp., 784; 46 State Rep., 595. Butterfield v. Bennett, 18 N. Y. Supp., 432. (In an action for libel imputing unchastity to plaintiff, a woman, defendant was held not entitled to a bill of particulars showing the names of persons who shunned plaintiff in consequence of the publication, but plaintiff would be required to give her own address so that defendant might investigate her antecedents.) Jacobs v. Water, &c., Co., 55 State Rep., 435; s. c. 25 N. Y. Supp., 346. (Plaintiff

required to give bill of particulars stating the names and addresses of the alleged persons, etc., who were intimidated, and who cancelled contracts with plaintiff, by reason of the libel charges.)

COMPLAINTS IN ACTIONS FOR TRESPASS ON REAL PROPERTY.

[Principal Case, p. 267, this Vol.]

- (1) *Acts constituting the trespass.*
- (2) *Plaintiff's possession, ownership, etc.*
- (3) *Description of the premises.*
- (4) *Damages, etc.*

(1) *Acts constituting the trespass.*

Alabama.—*Alabama Midland R. Co. v. Martin*, Alabama, 1893, 14 So. Rep., 401. (Where complaint alleges trespasses to have been continuous from day to day during a certain time, a demurrer upon the ground that it fails to state the time when the several trespasses were committed is properly overruled.) *California.*—*Merritt v. Hill*, 104 Cal., 184; s. c. 37 Pac. Rep., 893. (Demurrer to complaint sustained, which alleged that defendant's cattle trespassed on plaintiff's land, without alleging that the trespass was instigated by defendant, or that he had notice thereof.) *Indiana.*—*Atkinson v. Mott*, 102 Ind., 431; s. c. 26 N. E. Rep., 217. (In an action for trespass by cattle, an averment in complaint that defendant negligently and carelessly permitted the trespass, held to be surplusage; and that it was not necessary to allege that plaintiff was without fault.) *Salimonia, etc., Gas Co. v. Wagner*, 2 Ind. App., 81; s. c. 28 N. E. Rep., 158. (An allegation that defendant destroyed 150 bushels of potatoes may be supported by proof that defendant dug up and carried away the potatoes; since a growing crop planted by defendant constitutes personal property.) *Michigan.*—*Wood v. Mich., etc.*, R. Co. 81 Mich., 358; s. c. 45 N. W. Rep., 980. (Declaration alleging a trespass upon realty, regarded as stating a cause of action upon such ground, though it recited that plaintiff complains of defendant "of a plea of trespass on the case.") *New York.*—*Gans v. Hughes*, 41 State Rep., 106; s. c. 16 N. Y. Supp., 615. (One paragraph alleged that plaintiff was the lessee of a bakery on a certain day when defendant entered the premises and unlawfully removed a portion of the fixtures and unlawfully interfered with plaintiff's business. Other paragraphs set up trespasses on the premises. Held, that the former paragraph stated a cause of action for trespass to real estate, and was properly joined with the other causes of action set forth.) *South Dakota.*—*Tanderup v. Hansen*, South Dakota, 1894, 58 N. W. Rep., 578. (Where complaint alleged sufficient facts to constitute a cause of action for trespass of defendant's cattle upon plaintiff's land, held, that plaintiff, at the trial, might give evidence to sustain such cause of action, though the complaint also set up a fictitious contract of sale of the property destroyed.)

(2) *Plaintiff's possession, ownership, etc.*

Colorado.—*Colorado M. R. Co., v. Trevarthen*, 1 Colo. App., 152; s. c. 27 Pac. Rep., 1012. (In an action to recover damages caused to a city lot by the construction of a railway, the complaint must allege that plaintiff was the owner of the lot at the time the injury was suffered.) *Florida*.—*Jacksonville T. & K. W. R. Co., v. Griffin*. 33 Fla., 602; s. c. 15 So. Rep., 336. (Where the alleged trespass is one constituting a permanent and necessary injury to the market value of the plaintiff's fee in the land trespassed on, the failure of the declaration to allege that the plaintiff was in the possession of the land at the time of the trespass does not render the declaration demurrable.) *Indiana*.—*Branson v. Studebaker*, 133 Ind., 147; s. c. 33 N. E. Rep., 98. (Though plaintiff, to maintain such action need not plead title in himself, but only possession, yet if he makes a specific statement of title in himself, and denies title in defendant, the title is thereby put in issue.) *Pittsburgh, etc., R. Co., v. Harper*, *Indiana Appeals*, 1894; 37 N. E. Rep., 41. (Complaint held to sufficiently allege plaintiff's ownership at the time of the alleged trespass, though such allegation was in the present tense, where it also stated that plaintiff claimed title, and, the day before the alleged entry, notified defendant thereof, and that she would claim damages.) *Sunnyside Coal & Coke Co., v. Reitz*, *Indiana Appeals*, 1895, 39 N. E., 541. (Where complaint alleged that for a time the legal title to the land was in plaintiff's wife, but that she had no interest in the land and held the title for plaintiff's benefit, *held*, that the trust would be regarded as executed, and that sufficient was shown to enable plaintiff to recover for coal taken while the title of the land was in his wife.) *Michigan*.—*Kinney v. Service*, 91 Mich., 629; s. c. 52 N. W. Rep., 53. (Under the general averment of breaking and entering plaintiff's close plaintiff may prove his title and right of possession as against defendant.) *Missouri*.—*Bobb v. Syenite Granite Co.*, 41 Mo. App., 642. (A landlord seeking to recover for injury to his reversion should allege that the injury is of that character.)

(3) *Description of the premises.*

Illinois.—*Meixsell v. Feezor*, 43 Ill. App., 180. (It is not necessary to describe the close in which the trespass was committed.) *Massachusetts*.—*Foley v. McCarthy*, 157 Mass., 474; 32 N. E. Rep., 669. (A declaration for trespass on a private way described the way by giving its boundary on one side, its termini and width. *Held*, that while the description was not in form required by the practice act, it was not so imperfect as to require the court, in absence of demurrer, to rule at the trial that the declaration was insufficient.) *Leatherbee v. Barrett*, 152 Mass., 532; s. c. 25 N. E. Rep., 965. (*Held*, that defendant could not raise the objection, for the first time at the trial, that the declaration did not sufficiently comply with Pub. St. Mass., c. 167, sec. 6, providing that the place of the alleged trespass shall be designated by names, abutments, and other proper description.) *Pennsylvania*.—*Wolf v. Wolf*, 158 Pa., 621; 28 Atl. Rep., 164. (An amendment to a declaration in trespass, naming an entirely different tract from that described in the writ should not be allowed.) *United States*.—*Rico-Aspen Consol. Min. Co. v. Enterprise Min. Co.* (C. C. D., Colo.) 56 Fed.

Rep., 131. (*Held*, that it was sufficiently specific to describe premises as a mining claim of certain dimensions with a reference to the location certificate, and the patent for metes and bounds.) *Vermont*.—*Swerdferger v. Hopkins*, Vermont, 1894, 31 Atl. Rep., 153. (Description of premises in declaration as "plaintiff's close situated in the town of H," held sufficient. In trespass *quare clausum fregit*, it is not necessary to describe the premises with the same particularity as in ejectment.)

(4) *Damages, etc.*

Alabama.—*So. Suspender Co. v. Von Borries*, 91 Ala., 507; s. c. 8 So. Rep., 367. (A declaration is not demurrable on the ground that it unites in the same count an allegation of trespass to land with an allegation of trespass in taking therefrom personal property.) *California*.—*Mallory v. Thomas*, 98 Cal., 644; s. c. 33 Pac. Rep., 757. (Special demurrer to complaint for uncertainty sustained, where it alleged that a trespass upon plaintiff's premises resulted in the destruction of her property and business, and caused her mental and physical distress, but did not aver the value of the property destroyed, and the amount of damage to her premises and business.) *Mississippi*.—*Bonnelli v. Bowen*, 70 Miss., 142; s. c. 11 So. Rep., 791. (Where complaint alleged that defendant forcibly entered plaintiff's house, and violently seized and carried away a check against his will, *held*, that the taking of the check was the substantial offense, and that the other matters charged were merely in aggravation of damages.) *Missouri*.—*Cook v. Redman*, 45 Mo. App., 397. (An allegation of the destruction of grass on the premises trespassed on, merely sets out an element of damage flowing from such trespass.) *McCormick v. Kaye*, 41 Mo. App., 263. (Where petition is framed for the recovery of double or treble damages, under the Mo. R. S., 1879, sec. 3921, 3923, recovery can not be had as for a common law trespass.) *New York*.—*Van Hoffman v. Kendall*, 44 State Rep., 484; s. c. 17 N. Y. Supp., 713. (Complaint alleging a wilful entry upon plaintiff's land, and the cutting down of trees thereon, thereby lessening the value of the land, and claiming treble damages, is not demurrable; if treble damages are improperly claimed, plaintiff upon proper proof may recover single damages.) *North Carolina*.—*Harriss v. Sneed*, 104 N. C., 369; s. c. 10 S. E. Rep., 477. (Plaintiff may recover nominal damages for simple trespass, though no issue involving the question of simple trespass is submitted, and the charge made by the complaint is forcible trespass accompanied by slander of title.) *Pennsylvania*.—*Fairchild v. Dunbar Furnace Co.*, 128 Pa., 485; s. c. 18 Atl. Rep., 443. (Action for trespass *qu. cl. fr.* for cutting timber cannot be converted into an action for treble damages under the act of 1924, by filing an amended declaration.) *United States*.—*Thompson v. Gatlin*, 7 C. C. A., 357; s. c. 58 Fed. Rep., 534. (In an action for forcible entry and injury to crops, the injury to the crops must be separately stated.) *Vermont*.—*Benton v. Beattie*, 63 Vt., 186; s. c. 22 Atl. Rep., 422. (In an action of trespass *qu. cl. fr.* for cutting and carrying away timber, the court may allow a count in trover to be filed to recover for the timber, on proof that the timber was cut by a third person and received by defendant.)

ACTIONS FOR CRIMINAL CONVERSATION.

[Principal Case, p. 272, this Vol.]

Alabama.—Dowdall v. King, 97 Ala., 635; s. c. 12 So. Rep., 405. (In an action for crim. con., plaintiff cannot recover for a venereal disease contracted from his wife on account of her association with defendant, in absence of allegations in petition of special damages sustained by reason of such fact.) *Maine*.—Doe v. Roe, 82 Me., 503; s. c. 20 Atl. Rep., 83. (A wife cannot maintain an action against another woman for debauching and carnally knowing her husband.) *Minnesota*.—Kroessin v. Keller, Minn., 1895, 62 N. W. Rep., 438. (A wife cannot maintain an action of crim. con. against another woman.) *New York*.—Woods v. Gledhill, 35 State Rep., 597. (Plaintiff required to give a bill of particulars, where complaint alleged that defendant alienated the affections of plaintiff's wife by means of "gifts, presents, promises, threats and seductive and deceitful arts and wiles.") *Vermont*.—Daley v. Gates, 65 Vt., 591; s. c. 27 Atl. Rep., 193. (Where the original declaration charged that defendant enticed away plaintiff's husband, *per quod consortium amisit*, held, that a new count filed charging defendant with criminal conversation with him with the same *per quod*, did not contain a new cause of action.)

COMPLAINTS IN ACTIONS FOR ENTICING AWAY SPOUSE.

[Principal Case, p. 272, this Vol.]

Colorado.—Williams v. Williams, Colorado, 1894, 37 Pac. Rep., 614. (In an action for enticing away husband, complaint need only allege the ultimate facts, without stating the arts made use of by defendant to accomplish the illegal purpose.) *Connecticut*.—Foot v. Card, 58 Conn., 1; s. c. 18 Atl. Rep., 1027. (A wife may sue in her own name for the alienation of her husband's affections.) *Indiana*.—Haynes v. Nowlin, Indiana, 1891, 29 N. E. Rep., 389. (A wife may maintain an action in her own name against one who entices her husband from her and thereby deprives her of his consortium.) Followed in Wolf v. Wolf, Ind., 1892, 30 N. E. Rep., 308; Holmes v. Holmes, Ind., 1893, 32 N. E. Rep., 932; Railsback v. Railsback, Ind. App., 1895, 40 N. E. Rep., 276; Reed v. Reed, 6 Ind. App., 317; s. c. 33 N. E. Rep., 638. (In an action by a wife for the alienation of her husband's affections by his parents, complaint held demurrable for failing to allege that the acts complained of were done maliciously.) Adams v. Main, Ind. App., 1892, 29 N. E. Rep., 792. (Allegation and proof of adultery is not necessary to sustain an action for alienating a wife's affections.) *Iowa*.—Price v. Price, Iowa, 1894, 60 N. W. Rep., 202. (A wife may sue for damages for the alienation of husband's affections.) *Michigan*.—Warren v. Warren, 89 Mich., 123; s. c. 50 N. W. Rep., 842. (A wife may maintain an action in trespass for the alienation of her husband's affections.) *Missouri*.—Clow v. Chapman, Missouri, 1894, 28 S. W.

Rep., 328. (Wife may maintain an action in her own name for enticement of her husband.) *Nebraska*.—Hodgkinson v. Hodgkinson, Nebraska, 1895, 61 N. W. Rep., 577. (Wife may maintain an action against a person who causes her husband to desert her.) *New Hampshire*.—Seaver v. Adams, N. H., 1890, 19 Atl. Rep., 776. (A wife may sue in her own name another woman for seducing and alienating the affections of plaintiff's husband.) *New York*.—Bennett v. Bennett, 116 N. Y., 584; s. c. 23 N. E. Rep., 17. (Wife may maintain an action against a person who entices away her husband.)

COMPLAINTS IN ACTIONS OF EJECTMENT.

[Principal Case, p. 280, this Vol.]

- (1) *Plaintiff's ownership, title, estate, etc.*
- (2) *Description of premises.*
- (3) *Defendant's possession.*
- (4) *Mesne profits, incidental relief, etc.*

- (1) *Plaintiff's ownership, title, estate, etc.*

Arkansas.—Fagg v. Martin, 53 Ark., 449; s. c. 14 S. W. Rep., 647. (Held, that the deed on which plaintiff relied, and a state of facts to show a *prima facie* title, were sufficiently set forth and shown by a complaint, which alleged plaintiff's ownership, and defendant's possession, and exhibited as evidence of title a deed from the State land commissioner.) *Arizona*.—Oury v. Duffield, 1 Ariz., 509; s. c. 25 Pac. Rep., 533. (Held, that it was sufficient for complaint to aver that plaintiff, as administrator, was seised in fee and entitled to the possession of the premises, without averring possession or right of possession in his intestate.) *California*.—Hutchinson v. McNally, 85 Cal., 619; s. c. 23 Pac. Rep., 132. (On demurrer, complaint cannot be aided by a general allegation of ownership, if the deraignment of title is set forth, and it fails to show plaintiff's right to recover.) *Georgia*.—Hobby v. Bunch, 83 Ga., 1; s. c. 10 S. E. Rep., 113. (No recovery can be had upon the title of a person from whom no demise is laid in the declaration.) *Indiana*.—Myers v. Jackson, 135 Ind., 136; s. c. 34 N. E. Rep., 810. (An allegation that plaintiff is the owner and entitled to possession, is sufficient as against demurrer; the remedy, if any, being by a motion to make the complaint more definite and certain.) Roberts v. Vornhalb, 126 Ind., 511; s. c. 26 N. E. Rep., 207. (Held, that plaintiff could not be required to furnish a more specific abstract of title, and a bill of particulars; since bills of particulars are not required in actions for torts.) Morgan v. Lake Shore, etc., R. Co., 130 Ind., 101; 28 N. E. Rep., 548. (Where plaintiffs allege title in themselves specifically, a general allegation of ownership will not help them, if the specific allegations do not show title in them.) Ewing v. Lutz, 131 Ind., 361; s. c. 30 N. E. Rep., 1069. (Demurrer to complaint overruled which showed plaintiff's title to be based on a deed which was regular in form and founded on a valuable

consideration.) *Iowa*.—*Van Sickle v. Keith*, 88 Ia., 9; 55 N. W. Rep., 42. (Where the petition is based on the claim that the strip of land sought to be recovered was embraced within the description in plaintiff's grant, evidence of a conventional boundary and adverse possession are inadmissible, though allegations tending to support such facts are intermingled with the other allegations of the petition.) *Kentucky*.—*Howard v. Lock*, Kentucky, 1893, 22 S. W. Rep., 332. (A petition alleging that plaintiffs are the only children and heirs at law of the owner, who died seised of the property in 1869, does not show that plaintiffs were the owners of the land in 1892, when suit was brought.) *Howe v. Saddler*, Kentucky, 1894, 24 S. W. Rep., 277. (*Held*, that it was not error to reject an amended petition which merely sought to plead the evidence or origin of plaintiff's title.) *Michigan*.—*Ludeman v. Hirth*, 96 Mich., 17; s. c. 55 N. W. Rep., 449. (Where the declaration is defective because it does not set forth plaintiff's estate in the land, he should be permitted on the trial to amend it.) *Minnesota*.—*Merrill v. Dearing*, 47 Minn., 137; s. c. 49 N. W. Rep., 693. (Plaintiff may recover possession of land upon allegation and proof that he is equitable owner, but if he alleges only a legal title he cannot prove or recover upon an equitable title.) *New York*.—*Roberts v. Cullen*, 40 State Rep., 672; s. c. 16 N. Y. Supp., 517. (Defendant held entitled to a bill of particulars showing what particular land was sought to be recovered and the nature of plaintiff's alleged title, but not to a statement of facts upon which said claim is based.) *North Carolina*.—*Leatherwood v. Fulbright*, 109 N. C., 683; s. c. 14 S. E. Rep., 299. (Where recovery is sought upon an equitable title, it is essential that the complaint should set forth the facts upon which the same is grounded.) *S. P. Geer v. Geer*, 109 N. C., 679; s. c. 14 S. E. Rep., 297. *Oregon*.—*Bingham v. Kern*, 18 Ore., 199; s. c. 23 Pac. Rep., 182. (Under Ore. Code, sec. 318, complaint must allege that plaintiff is entitled to the possession of the property.) *Johnson v. Crookshanks*, 21 Ore., 339; s. c. 29 Pac. Rep., 78. (Where complaint alleged that plaintiff was the owner of and entitled to the possession of the premises, held, that the failure of the complaint to state the nature of plaintiff's estate was waived by an answer setting up new matter.) *Mitchell v. Campbell*, 19 Ore., 198; s. c. 24 Pac. Rep., 455. (It is only necessary for a complaint to allege the nature of plaintiff's estate in the property, that he is entitled to its possession, and that the defendant wrongfully withholds the same from him to his damage in a sum claimed. The property should also be described with sufficient certainty to enable possession thereof to be delivered in case a recovery be had.) *South Dakota*.—*Lewis v. St. Paul, etc., Ry. Co.*, South Dakota, 1894, 58 N. W. Rep., 580. (*Held*, that a complaint alleging that plaintiffs owned and held the land in question by virtue of a trust deed made by the former owner to plaintiffs in trust for certain beneficiaries named, showed a sufficient title in plaintiffs to enable them to maintain the action.) *Utah*.—*Jones v. Mommott*, 7 Utah, 340; s. c. 26 Pac. Rep., 925. (Complaint held sufficient, which alleged that "plaintiff is, and at all times therein mentioned was, the owner of, and seized in fee of * * * and that the defendant is in possession thereof, and unlawfully withholds the same from plaintiff to her damage.") *Virginia*.—*Roach v. Blakey*, 89

Va., 767; s. c. 17 S. E. Rep., 228. (Held, that it was sufficient to allege, that on a day specified, before bringing the action plaintiffs were possessed "each in fee simple absolute of an undivided share or interest in" the land, and that the action "is for the whole of the land so claimed, and not for any part or parcel" thereof.) *Washington*.—*Belles v. Miller*, Washington, 1894, 38 Pac. Rep., 1050. (The nature of plaintiff's estate in the lands held to be stated with sufficient definiteness by an allegation, that he was owner of the land subject to defendant's right to redeem, that he became owner under an execution sale to satisfy a valid judgment entered in the cause, and that such sale was confirmed, and setting forth the sheriff's certificate of sale.) *West Virginia*.—*Jarrett v. Stevens*, 86 W. Va., 445; 15 S. E. Rep., 177. (An allegation that plaintiff "was possessed in fee" of the land is a sufficient allegation that he claims in fee.) *Wisconsin*.—*Methodist Epis. Church v. Northern Pac. R. Co.*, 78 Wis., 131; 47 N. W. Rep., 190. (Plaintiff must aver that he is entitled to possession at the commencement of the action.)

(2) *Description of the premises.*

California.—*Pierce v. Hilton*, 102 Cal., 276; s. c. 36 Pac. Rep., 595. (Description is not bad for insufficiency, if it is capable of ascertainment.) *Muir v. Meredith*, 82 Cal., 19; s. c. 22 Pac. Rep., 1080. (Complaint held to contain a sufficient description, which called for a well ascertained beginning point from whence a line is to be run to a designated monument, a "station fence post," and then giving the course of every other call in the description.) *Hihn v. Mangenberg*, 89 Cal., 268; s. c. 26 Pac. Rep., 968. (As against a special demurrer, complaint held sufficient which described the land as being in S. township, S. C. County, Cal., and bound on the northeast by B. Avenue, on the southeast by land of M. E., and on the southwest and northwest by S. creek.) *Cole v. Segraves*, 88 Cal., 103; s. c. 25 Pac., 1109. (Complaint held not demurrable for not alleging the county in which the premises were situated, where it specified the name of the town in which they were located; since the court will take judicial notice of the county in which the town named may be.) *Florida*.—*Buesing v. Forbes*, 38 Fla., 495; s. c. 15 So. Rep., 209. (If a surveyor would have no difficulty in locating the land sued for by the description in the declaration, it is sufficient.) *Georgia*.—*Polhill v. Brown*, 84 Ga., 338; s. c. 10 S. E. Rep., 921. (Where the declaration, and the deeds under which both parties claim, describe the land as lot No. 59, known as the Davis place, and it is shown that the Davis place was lot No. 69, the declaration may be amended accordingly.) *Indiana*.—*Liggett v. Lozier*, 133 Ind., 451; s. c. 32 N. E. Rep., 712. (The description of of the land contained in a copy of a deed attached to the complaint as an exhibit, but which is not the foundation of the action, cannot aid the want of description in the body of complaint.) *Montana*.—*Haggin v. Lorenz*, Montana, 1895, 39 Pac. Rep., 285. (The general description in complaint is controlled by the courses and distances stated.) *New York*.—*Rowland v. Miller*, 44 State Rep., 826; 18 N. Y. Supp., 205; 22 C. P., R. 25. (Complaint held demurrable, where the attempted description of premises in effect merely de-

scribed a straight line.) *Barley v. Roosa*, 18 N. Y. Supp., 209; s. c. 20 Civ. Pro., R. 113. (Where complaint described 25 acres in a single parcel, held, that plaintiff could recover 11 acres thereof without amending his complaint.) *Utah*.—*Darger v. Le Sieur*, 9 Utah, 192; s. c. 33 Pac. Rep., 701. (Demurrer to complaint for its uncertainty in the description of the premises sustained, where the description was not sufficient to enable an officer on execution to identify the property.) *Vermont*.—*Cushing v. Fenn*, 63 Vt., 106; s. c. 21 Atl. Rep., 272. (In ejectment against a tenant holding over, the declaration described the premises as the dwelling and out buildings, "and a small piece of land adjoining the same."—Held, that it was sufficient to justify recovery of the buildings and garden, but that it was too indefinite to embrace a pasture connected with the garden, though the pasture was a part of the farm leased by defendant.) *Wisconsin*.—*Ayers v. Reidel*, 84 Wis., 276; s. c. 54 N. W. Rep., 588. (Description of the land in complaint is sufficiently certain, if by the aid of a competent surveyor, and persons knowing the monuments or objects mentioned as boundaries, the lands can be found.)

(3) *Defendant's possession.*

California.—*McKissick v. Ashby*, 96 Cal., 422; s. c. 33 Pac. Rep., 729. (A complaint, alleging the leasing of the premises to defendant; that the lease had expired, and that defendant refused to vacate the premises and has withheld, and still withholds the possession thereof, from the plaintiff—sufficiently avers that defendant is in possession.) *Hihn v. Mangerberg*, 89 Cal., 268; s. c. 26 Pac. Rep., 968. (Demurrer overruled to a complaint, which alleged that plaintiff was seized in fee of the reality, and that defendant was in possession, and against plaintiff's will detained and withheld the possession thereof.) *Minnesota*.—*Gowan v. Bense*, 53 Minn., 46; s. c. 54 N. W. Rep., 984. (A general allegation that defendant wrongfully detains the possession can have no effect, where the specific facts alleged show him not to be in possession.) *Rhode Island*.—*Whipple v. McGinn*, 18 R. I., —; s. c. 25 Atl. Rep., 652. (Wrongful detainer must be averred.) *South Carolina*.—*Tompkins v. Railroad Company*, 33 S. C., 216; s. c. 11 S. E. Rep., 692. (Demurrer sustained to a complaint which alleged that defendant, a railroad company, unlawfully and without plaintiff's consent, took possession of a strip of plaintiff's land on which to construct its road, without alleging that defendant had not acquired a right to enter by the exercise of the power of eminent domain.)

(4) *Mesne profits, incidental relief, etc.*

California.—*Johnson v. Visher*, 96 Cal., 810; s. c. 31 Pac. Rep., 106. (In an action to recover the possession of the premises and the mesne rents and profits, it is not necessary to aver that the defendant received the rents and profits.) *Missouri*.—*Morrison v. Harrington*, 120 Mo., 665; s. c. 25 S. W. Rep., 568. (Petition in ejectment may be amended by the addition of a count praying for the cancellation of certain deeds by defendant of the land in controversy.) *North Carolina*.—*Bryan v. Spivey*, 106 N. C., 95; s. c. 11 S. E. Rep., 510. (One action may be brought against several

trespassers settled on different parts of the same tract of land, and in such a case it is a matter of discretion to allow a severance and separate trial as to each defendant.) *Ohio*.—*Hills v. Ludwig*, 46 Ohio St., 373; s. c. 24 N. E. Rep., 596. (Where omitted land is brought in by amendment of complaint, the amendment does not relate back to the time of bringing the action so as to authorize a recovery of such land, if its recovery was barred by the statute of limitations when the amendment was allowed.) *Wisconsin*.—*Methodist Epis. Church v. Northern R. R. Co.*, 78 Wis., 131; s. c. 48 N. W. Rep., 190. (A complaint which insufficiently states a cause of action in ejectment in failing to allege that plaintiff was entitled to possession at the commencement of the action cannot be sustained as setting forth a cause of action in trespass for *mesne* profits; since the recovery of *mesne* profits is merely incidental to the recovery in ejectment.)

COMPLAINTS IN ACTIONS FOR AN ACCOUNTING.

[Principal Case, p. 287, this Vol.]

Alabama.—*Beggs v. Edison Electric Light, etc., Co.*, 96 Ala., 295; s. c. 11 So. Rep., 381. (Demurrer should be sustained, where it is merely alleged that there is a complication in the accounts, without averring in what respect.) *Attalla, etc., Manuf. Co. v. Winchester, Ala.*, 1894, 14 So. Rep., 565. (Bill cannot be maintained, where the accounts are neither mutual or complicated.) *Illinois*.—*Angelo v. Angelo*, 146 Ill., 629; s. c. 35 N. E. Rep., 229. (Demurrer should have been sustained to a bill against a co-tenant in common, which did not show that he received any rents, nor the value of the land, but merely showed defendant's occupancy of the premises, and plaintiff's forbearance to occupy them.) *Cook County v. Davis*, 148 Ill., 151; s. c. 32 N. E. Rep., 176. (A bill upon a purely legal demand, not filed in aid of an action at law, and seeking only the discovery of witnesses' names, shows no ground of equitable jurisdiction.) *Maine*.—*Hager v. Whitmore*, 82 Me., 248; s. c. 19 Atl. Rep., 444. (A bill may be retained against a trustee in order to effectuate an accounting and adjustment between the parties, including matters subsequent to the filing of the bill, although plaintiff fails to establish the allegations of the bill.) *Massachusetts*.—*Tateum v. Ross*, 150 Mass., 440; s. c. 23 N. E. Rep., 290. (A bill will lie for the recovery of the proceeds of insurance, less the amount of the debt, death assessments and expenses, from a creditor, who held the policy as a collateral; as he stands in a trust relation, and an accounting is necessary.) *Michigan*.—*Nash v. Buchard*, 87 Mich., 85; s. c. 49 N. W. Rep., 492. (A financial agent cannot maintain an action for an accounting, on the ground that he paid certain debts and became an indorser for his principal; as he is presumed to know the amounts which he has received and paid out.) *Warren v. Holbrook*, 95 Mich., 185; s. c. 54 N. W. Rep., 712. (A bar-keeper required to keep an account of money received, and to pay it over to his employer, occupies a fiduciary relation, and can be compelled to account in a court of equity.) *Holmes v. Mal-*

colm McDonald Lumber Co., 95 Mich., 606; s. c. 55 N. W. Rep., 450. (The action will lie, where several parties are interested in a fund held by a trustee, where the facts are complicated, and fraud is alleged.) *New York*.—Schnaier v. Schmidt, 13 N. Y. Supp., 725; s. c. 37 State Rep., 633. (Where the cause of action set forth involves only an obligation for the payment of a specific sum of money by one firm to another, the circumstance that one of the defendants was a member of each firm does not present a case for an accounting.) *Abbey v. Wheeler*, 32 N. Y. Supp., 1069. (A Court of Equity will not assume jurisdiction of an action brought solely for an accounting, where that is the incidental and not the prime relief sought.) *Oregon*.—Hoyt v. Clarkson, 23 Ore., 51; s. c. 31 Pac. Rep., 198. (Where the court finds there was a settlement, but allows it to be opened for the purpose of showing errors and mistakes, plaintiff should, before being allowed to introduce evidence, be compelled to amend his complaint so as to specify the errors and mistakes relied on.) *Rhode Island*.—McCulla v. Beadleston, 17 R. I., 20; s. c. 20 Atl. Rep., 11. (An accounting for over payments in the purchase of goods cannot be maintained by reason of a trust relation, although it is alleged that plaintiff was agent to sell the goods for defendant, it appearing that the goods were to be plaintiff's.) *United States*.—Babbott v. Tewksbury, 46 Fed. Rep., 86. (A suit will not lie upon a contract to pay complainant commissions on certain sales, the amounts of which are unknown to the complainant; since he has an adequate remedy at law.) *Virginia*.—Goddin v. Bland, Va., 1891, 13 S. E. Rep., 145. (A mere dispute between an employer and employee as to the quantity of wood delivered, which was to be paid for by the cord, presents no ground for equity jurisdiction, though the account is a long one.)

COMPLAINTS IN ACTIONS TO SETTLE PARTNERSHIP ACCOUNTS.

[Principal Case, p. 294, this Vol.]

Alabama.—Haynes v. Short, 88 Ala., 562; s. c. 7 So. Rep., 157. (On motion to dismiss for want of equity, a bill praying an account be taken "to determine the amount put in a firm by orator's intestate, and how much thereof is due his estate; and a decree against the surviving partner for the amount found due,—will be deemed to be already amended, so as to contain the necessary allegations, as to the approximate amount of the partnership's debts, the amount of profits and expenses, and the amount received by each partner, and to contain a prayer for the settlement of the whole partnership.) *New York*.—Ketchum v. Lewis, 46 State Rep., 843; s. c. 19 N. Y. Supp., 452. (Complaint setting forth several transactions between plaintiff and defendant as co-partners, held to state but one cause of action.) *Teschemacher v. Lenz*, 31 N. Y. Supp., 543; s. c. 32 Hun, 594. (In an action for the dissolution of partnership and for an accounting, the particular transaction as to which the accounting will be required need not be specified in the complaint.) *Rhode Island*.—

Congdon v. Aylsworth, 19 R. I., 28; s. c. 18 Atl. Rep., 247. (Though the right of discovery is waived, a bill is sufficient to sustain an accounting, which alleges, a partnership between complainant and defendant, which has been dissolved, but whose accounts have never been settled; that the books and papers thereof are in defendant's possession, and his refusal to allow their inspection by complainant.) *United States*.—*Rosenstein v. Burns*, 41 Fed. Rep., 841. (Bill alleging that the defendant partner willfully neglected to comply with the partnership agreement, that the business was being conducted at a loss, and that complainants were induced to enter into the agreement through defendant's misrepresentations,—is not multifarious.) *Vermont*.—*Park v. McGowan*, 64 Vt., 173; s. c. 23 Atl. Rep., 835. (In an action against the administrator of a deceased partner for what he might have received above his share, it is not essential to allege that the administrator received the property belonging to the deceased, or to the partnership.)

COMPLAINTS IN ACTIONS OF FORECLOSURE.

[Principal Case, p. 301, this Vol.]

Alabama.—*Christian v. American, etc., Mortgage Co.*, 92 Ala., 130; s. c. 9 So. Rep., 219. (Conveyance to mortgagor may be alleged by an averment, that a person named conveyed to him, with or without a statement of the grounds on which such allegation is based.) *Bedell v. New England Mortgage Security Co.*, 91 Ala., 325; s. c. 8 So. Rep., 494. (Where a mortgage contains a power of sale on default, in order to recover attorney's fees in the foreclosure suit, some facts must be alleged to show that that form of foreclosure was necessary.) *Mullens v. American, etc., Mortgage Co.*, 88 Ala., 280; s. c. 7 So. Rep., 201. (It is error to overrule a demurrer to a bill which fails to allege that defendant, a foreign corporation, was authorized to do business in the state, at the time the mortgage was executed and delivered;) *S. P. Farrier v. New England Mortgage Security Co.*, 88 Ala., 275; s. c. 7 So. Rep., 200. *California*.—*Hewitt v. Dean*, 91 Cal., 617; s. c. 25 Pac. Rep., 753. (Plaintiff need not demand payment, or give notice of his election to regard the whole sum of principal and interest due, before foreclosing because of a default in the payment of interest.) *Whitby v. Rowell*, 82 Cal., 635; s. c. 23 Pac. Rep., 40. (Demurrer overruled, where the land was not described in the body of the complaint, but a full description thereof was contained in a copy of the mortgage annexed to the complaint.) *S. P. Scott v. Sells*, 88 Cal., 599; s. c. 26 Pac. Rep., 850. *San Francisco Breweries v. Schurtz*, 104 Cal., 420; s. c. 33 Pac. Rep., 92. (*Held*, that a defendant's interest was sufficiently alleged by an averment that defendant "had or claimed to have some interest" in the mortgaged property, which was subsequent and subject to the mortgage.) As to the allegations necessary to recover reasonable attorney's fees, stipulated to be paid by the mortgage, see *First National Bank v. Holt*, 87 Cal., 158; s. c. 25 Pac. Rep., 272; *Lee v. McCarthy*, Cal., 1894, 35 Pac. Rep., 1034; *Hewett v.*

Dean, 91 Cal., 5, 617; s. c. 25 Pac. Rep., 753. *Florida*.—Long v. Herrick, 26 Fla., 356; s. c. 8 So. Rep., 50. (The formal prayer for such other and further relief as equity may require does not authorize a personal judgment against mortgagor's wife, who joined in the mortgage for the purpose of relinquishing her right of dower.) *Indiana*.—Brunson v. Henry, Ind., 1894, 89 N. E. Rep., 256. (In an action by the heirs of a deceased mortgagee, complaint is bad, if it fails to allege that there were no debts against decedent's estate, and that no letters of administration have been granted.) *Kentucky*.—Bailey v. Fanning Orphan School, Ky., 1890, 14 S. W. Rep., 908. (Where it was alleged that the mortgage was recorded in the county where the land was situated, it was held immaterial that neither the petition or the mortgage showed in what county the land was located.) *Missouri*.—Knox v. Brown, 103 Mo., 223; s. c. 15 S. W. Rep., 382. (After a verdict it is too late to object that the petition does not allege that a purchaser's vendor, as well as the purchaser, had notice of the mortgage.) *Nebraska*.—Dimick v. Grand Island Banking Co., 37 Neb., 394; s. c. 55 N. W. Rep., 1066. (The provision of the Code, that the petition shall state whether any proceedings have been had at law for the recovery of the debt, or any part thereof, applies only to formal mortgages, and not to equitable mortgages, and liens.) *New Jersey*.—Wheeler & Wilson Manuf. Co. v. Filer, N. J. Ch., 1893, 28 Atl. Rep., 13. (The fact that the bill alleges nothing in terms against a defendant against whom it prays process is not a ground for demurrer if he is informed by the notice annexed to his subpoena that he is made a party because he holds a mortgage on the premises.) *New York*.—Preston v. Loughran, 58 Hun, 210; s. c. 12 N. Y. Supp., 313; 34 State Rep., 391. (A judgment of foreclosure is not invalidated because the complaint does not allege that the assignment of the bond to the plaintiff as well as the mortgage, where the assignment of both bond and mortgage was proved at the trial.) Albany City National Bank v. Hudson River Brick Co., 29 N. Y. Supp., 793. (Demurrer of one of the defendants properly overruled, where complaint alleged that he had, or claimed, some interest in the mortgaged property.) *North Dakota*.—Fisher v. Bouisson, 3 N. Da., 493; s. c. 57 N. W. Rep., 505. (Demurrer sustained to a complaint, on the ground that it did not show whether or not any proceedings had been had at law for the recovery of the mortgage debt, though it alleged that no other foreclosure proceedings had been instituted, except an unsuccessful effort to foreclose by advertisement.) *Ohio*.—Winemiller v. Laughlin, Ohio, 1894, 38 N. E. Rep., 111. (In order to bar another lien holder, it is sufficient if the petition allege that such defendant claims some interest in the mortgaged premises, and advises him that his claim or lien will be barred, if he fails to appear and disclose it.) *Tennessee*.—Clark v. Jones, 93 Tenn., 639; s. c. 27 S. W. Rep., 1009. (A bill by the transferee of a note secured by a trust deed to foreclose the lien need not allege that the trustee refused to execute the trust, or that his execution thereof was impeded by the maker of the note.) *Washington*.—Dexter v. Long, 2 Wash., 433; s. c. 27 Pac. Rep., 271. (Held, that it was sufficient to allege that a defendant had, or claimed, some interest in, or lien upon, the mortgaged property; but that the same, whatever it might be

was subject to plaintiff's mortgage.) *Richmond v. Voorhees*, Wash., 1894, 38 Pac. Rep., 1014. (A complaint alleging that the mortgage was executed by a named person as attorney in fact for defendant, but not alleging that such person had been constituted defendant's attorney in fact,—held to be sufficient, where it was also generally alleged that the mortgage was executed by defendant.)

COMPLAINTS IN ACTIONS OF PARTITION.

[Principal Case, p. 311, this Vol.]

Alabama.—*Wolfe v. Loeb*, 98 Ala., 426; s. c. 13 So. Rep., 744. (A sale of real estate for distribution under a petition to the probate court is void, where the petition fails to set forth the interest in the property of each co-owner as required in a petition for partition by Civ. Code, § 3239.) *McEvoy v. Leonard*, 89 Ala., 455; s. c. 8 So. Rep., 40. (Demurrer properly sustained to a bill praying that the land be sold for distribution, which did not allege that the property could not be equitably divided without sale.) *Id.* (Demurrer also sustained, on the ground that the bill showed an adverse holding on disputed facts. The title must be determined before the land can be sold for distribution.) *Indiana*.—*Brown v. Brown*, 133 Ind., 476; s. c. 32 N. E. Rep., 1123; *Id.*, 33 N. E. Rep., 615. (Demurrer properly sustained, where complaint merely alleged that plaintiffs were children of a deceased grantee, without alleging that such grantee died seised, or that plaintiffs had an interest in the land, when the action was commenced.) *Prather v. Prather*, Ind., 1894, 39 N. E. Rep., 310. (An allegation that plaintiff made improvements on the land, "an itemized statement of which is as follows," stating in detail their extent and value,—held to sufficiently allege that plaintiff paid for such improvements.) *Louisiana*.—*Fix v. Koepke*, 44 La. Ann., 745; s. c. 11 So. Rep., 39. (The absence of an averment of the value of the property, and where located, can be cured by amendment.) *Missouri*.—*Thompson v. Holden*, 117 Mo., 118; s. c. 22 S. W. Rep., 905. (It is sufficient, if the petition allege that a party claims some interest, the value of which is to the plaintiff unknown, and which is left to the party himself to specially assert.) *Waddell v. Waddell*, 99 Mo., 338; s. c. 12 S. W. Rep., 349. (Where the general right to the whole land is being litigated, the fact that parties to the suit rely upon distinct and independent rights does not make the petition multifarious.) *Lilly v. Menke*, Mo., 1894, 28 S. W. Rep., 643. (An allegation that defendant has been in possession of the property, and has received the rents and profits thereof, is not sufficient to support a claim for rents, in absence of an allegation that plaintiff was denied a joint occupancy of the premises.) *Beck v. Kallmeyer*, 42 Mo. App., 563. (An accounting for rents may be allowed in a proceeding in equity to partition land, but not in a statutory proceeding.) *New York*.—*Townsend v. Bogert*, 126 N. Y., 370; s. c. 27 N. E. Rep., 555. (Where complaint alleged that the land could not be divided, and stated a good cause of action against a co-tenant, and alleged that another defendant claimed

some interest in the land, the exact nature of which was unknown to plaintiff,—held, that a good cause of action was stated against the latter defendant; since it would be necessary to sell the property.) *Bowen v. Sweeney*, 68 Hun, 224; 17 N. Y. Supp., 753; s. c. 63 State Rep., 182. (In an action by an heir against devisees, complaint must allege the invalidity of the devise as required by Code Civ. Pro., § 1537.) *Balen v. Jacquelin*, 67 Hun, 311; s. c. 51 State Rep., 643; 22 N. Y. Supp., 193. (Plaintiff's possession is sufficiently stated by an allegation that plaintiff and defendants are seised and possessed of the land.) *North Carolina*.—*McGill v. Buie*, 106 N. C., 242; s. c. 11 S. E. Rep., 284. (A petition which alleges that the parties are tenants in common, and admits that defendant is in possession, claiming a share, but not admitting that he claims sole seisen is not demurrable on the ground that it is impliedly admitted that plaintiff is not in possession.) *United States*.—*Willard v. Willard*, 145 U. S., 116; s. c. 36 L. ed., 644; 12 Supm. Ct. Rep., 818. (In the Dist. of Columbia, it was held sufficient for the bill to merely allege that plaintiff desires to have partition of the land, and his share set apart to him in severality, or, if in the opinion of the court this could not be done without injury to the parties, etc., then by sale of the land and a division of the proceeds, without alleging any special reason for partition, or for having it made in one way or the other.) *Sanders v. Devereux*, 60 Fed. Rep., 311. (Demurrer sustained, where bill showed that complainant was disseised.) *Washington*.—*Hill v. Young*, 7 Wash., 83; s. c. 34 Pac. Rep., 144. (It is not necessary to allege the necessity for a sale in lieu of an actual partition, or that a partition cannot be made.) *West Virginia*.—*Ransom v. High*, 37 W. Va., 838; s. c. 17 S. E. Rep., 413. (In equity, an allegation of demand and refusal of partition is unnecessary.) *Id.* (It is not necessary for plaintiff to make a formal deraignment of title, further than is necessary to show how the parties became co-owners.)

COMPLAINTS IN CREDITOR'S ACTIONS.

[Principal Case, p. 328, this Vol.]

- (1) *Plaintiff's claim, judgment, etc.*
- (2) *Defendant's interest in the property sought to be reached.*
- (3) *The fraud.*
- (4) *Exhaustion of legal remedies, issuing of execution, etc.*

- (1) *Plaintiff's claim, judgment, etc.*

Alabama.—*Gibson v. Trowbridge Furniture Co.*, 93 Ala., 579; s. c., 9 So. Rep., 370. (Bill should set forth the character of plaintiff's demands, and when they became due.) *McGhee v. Importers' and Traders' National Bank*, 93 Ala., 192; s. c., 9 So. Rep., 734. (Demurrer should be sustained, where bill shows that plaintiff's debt is not due.) *Jones v. Smith*, 93 Ala., 455; s. c., 9 So. Rep., 179. (The bill of the assignee of a judgment creditor need not aver that the assignment was in writing.) *Gibson v. Trowbridge Furniture Co.*, *supra*. (On demurrer, held that a bill by several creditors sufficiently stated that the debts were due and demandable

when the bill was filed, by an allegation that the prices of the goods sold by them are owing, unpaid and due.) *California*.—*Tatum v. Rosenthal*, 95 Cal., 129; s. c., 80 Pac. Rep., 186. (Where the judgment recovered by plaintiff is set out in the complaint, it need not be alleged that the judgment was based on a valid and subsisting debt.) *Indiana*.—*Eller v. Lacy*, Ind., 1894, 36 N. E. Rep., 1088. (Demurrer should have been sustained, where complaint merely alleged the recovery of a judgment against defendant without stating any facts to show its character or validity.) *Doherty v. Holiday*, Ind., 1893, 32 N. E. Rep., 815. (A complaint in the nature of a creditor's bill need not state a joint cause of action in favor of all the plaintiffs, and it is sufficient, though it shows that the claim of each is separate and distinct.) *Minnesota*.—*Sawyer v. Harrison*, 43 Minn., 297; s. c., 45 N. W. Rep., 434. (Complaint must state facts showing that the plaintiff occupied a status either as creditor, or as the representative of creditors; a mere general allegation, that he was appointed by order of the court the receiver of all of grantor's property, is not sufficient.) *Scanlan v. Murphy*, 51 Minn., 536; s. c., 53 N. W. Rep., 799. (In pleading the judgment, it is enough to allege that it was rendered in an action pending.) *Mississippi*.—*Browne v. Hershheim*, 71 Miss., 574; s. c., 14 So. Rep., 36. (Bill held to be demurrable by any person joined with debtor as a co-defendant, where it did not show that debts sought to be enforced were due.) *New York*.—*Louis v. Belgard*, 43 State Rep., 766; s. c., 17 N. Y. Supp., 882. (Demurrer sustained, where complaint alleged that plaintiff had a claim for goods sold and delivered by him to deceased insolvent debtor, without alleging a sale, value or agreed price.) *United States*.—*Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep., 7. (A bill to set aside a deed of trust of corporate assets to secure debts for which the directors of the company were themselves liable as sureties, need not show that the complainant has established his claim by judgment.) *Wisconsin*.—*Faber v. Matz*, 86 Wis., 370; s. c., 57 N. W. Rep., 39. (A creditor's bill is not demurrable because it fails to allege that it was not brought collusively as required by Cir. Ct. Rule 28, subd. 1.) *Marston v. Dresden*, 76 Wis., 418; s. c., 45 N. W., Rep., 110. (Complaint stating the amount due on the judgment, and facts showing that there is no collusion between the parties to the action, and that plaintiffs prosecute only to satisfy their judgment, sufficiently complies with Cir. Ct. Rule 28, subd. 1.)

(2) *Defendant's interest in the property sought to be reached.*

Indiana.—*Slagel v. Hoover*, 137 Ind., 314; s. c., 36 N. E. Rep., 1099. (Complaint need not allege that the property conveyed was subject to execution, since its exemption would be a matter of defence.) *Bright v. Bright*, 132 Ind., 56; s. c., 31 N. E. Rep., 470. (Demurrer should have been sustained, where complaint showed that defendant furnished his son with money to purchase land, but failed to show that the land was purchased in trust for defendant.) *Michigan*.—*Dutton v. Thomas*, 97 Mich., 98; s. c., 56 N. W. Rep., 229. (A creditor's bill for discovery is not required to point out the property sought to be reached.) *Gibbons v.*

Pemberton, 101 Mich., 397; s. c., 59 N. W. Rep., 663. (In absence of demurrer, debtor's ownership held to be sufficiently stated by an allegation, that he executed a deed for a pretended consideration by which he pretended to convey the land in question.) *Missouri*.—Jamison v. Bagot, 106 Mo., 240; s. c., 16 S. W. Rep., 697. (Under a complaint alleging that the wife of the judgment debtor claimed to own the land which debtor had fraudulently conveyed to a third person, and that she was therefore made defendant, held, that it was competent to introduce evidence impeaching the wife's title.) *Pennsylvania*.—Ferguson v. Yard, 104 Penn., 586; s. c., 30 Atl. Rep., 517. (A bill to subject certain property to a judgment recovered against one as executrix must allege that the property, or a part thereof, belonged to decedent's estate.)

(3) *The fraud.*

Alabama.—Cartwright v. Bamberger, 90 Ala., 405; s. c., 8 So. Rep., 264. (An averment, in a bill by an attaching creditor to set aside the attachment of another as fraudulent, that the demand on which the attachment was based was "simulated" is an averment of fact, and not a legal conclusion.) McGhee v. Importers' and Traders' National Bank, 93 Ala., 192; s. c., 9 So. Rep., 734. (It is not necessary to allege that debtor's voluntary grantee participated in the fraud.) Klein v. Miller, 97 Ala., 506; 11 So. Rep., 830. (Demurrer properly overruled to a bill which alleged that the sale was made for a pretended antecedent debt of \$10,700, which was in whole or in part simulated, and that the real value of the goods sold was \$15,000.) Loucheim v. Talladega First National Bank, Ala., 1893, 13 So. Rep., 374. (A general averment that the conveyance was executed for the purpose of hindering and delaying creditors is of no consequence; only the facts alleged will be considered.) Scholze v. Steiner, Ala., 1893, 14 So. Rep., 552. (An averment of the mere conclusion that the transfer was not made in good faith, but for the purpose of hindering, delaying and defrauding creditors, cannot be attacked by a motion to dismiss the bill for want of equity, but on such motion the defective averment will be treated as amended.) Curran v. Olmstead, Ala., 1894, 14 So. Rep., 398. (Demurrer properly sustained to a bill, which merely averred that the sale was made with the intent to hinder, delay, or defraud creditors, and that the transferee participated in such intent.) Williams v. Spragins, Ala., 1894, 15 So. Rep., 247. (General averments of facts, from which, unexplained, a conclusion of fraud arises, are sufficient.) *California*.—Fitzgerald v. Neustadt, 91 Cal., 600; s. c., 27 Pac. Rep., 936. (Held, that the debtor's insolvent condition at the time of the alleged fraudulent sale was sufficiently shown by the following allegation; "that at the time of the attempted sale . . . and for a long time prior thereto, the said G. was, and ever since has been indebted to various persons in large sums of money; and during all said times was, and still is, unable to pay his debts from his own means, as said debts became due, and then was, and still is, an insolvent debtor," etc.) Threlkel v. Scott, Cal., 1893, 34 Pac. Rep., 851. (Complaint held to be sufficient on demurrer, which alleged generally, that the grantor was insolvent when

the conveyance was made, and that it was done with intent to defraud creditors.) *Windhous v. Bootz*, 92 Cal., 617; s. c., 25 Pac. Rep., 404. (It must be alleged and proved, that, at the time the conveyance was made, the debtor had no other property subject to execution out of which his debts could be satisfied.) *Colorado*.—*Taney v. O'Connell*, 16 Colo., 353; s. c., 27 Pac. Rep., 888. (In an action by a judgment creditor to have debtor's wife declared a trustee for property purchased in her name with her husband's money, *held*, that it was not necessary to allege that the debtor was insolvent, when his wife took title; since the action was not to set aside the conveyance, but to uphold it. *Illinois*.—*Deimel v. Brown*, 136 Ill., 586; s. c., 27 N. E. Rep., 44; *Affirming* 35 Ill. App., 303. (Where bill seeks to make the purchaser from debtor liable on the theory that he is indebted for the price, it need not be alleged that complainant was a creditor of the principal debtor when the sale took place.) *Keller v. Whitlege*, 88 Ill. App., 310. (A conveyance, made with the direct purpose of defrauding creditors, may be attacked without charging insolvency as the result of such conveyance.) *Indiana*.—*Shew v. Hews*, 126 Ind., 474; s. c., 26 N. E. Rep., 433. (Demurrer sustained, where complaint failed to allege that the debtor was insolvent.) *Winstandley v. Stipp*, 132 Ind., 548; s. c., 32 N. E. Rep., 302. (Complaint is demurrable, if it fails to allege that at the time of the conveyance the grantor had no other property subject to execution.) *York v. Rockwood*, 132 Ind., 358; s. c., 31 N. E. Rep., 1110. (*Held*, that it was sufficient to allege that defendant did not have at the time of conveyance, and has not since had, up to the time of commencement of the suit, sufficient property subject to execution to pay his debts.) *McAninch v. Dennis*, 123 Ind., 21; s. c., 23 N. E. Rep., 881. (It is not necessary to allege fraud or knowledge of debtor's fraud, or insolvency on the part of those taking the conveyances without consideration.) *Petree v. Brotherton*, 133 Ind., 692; s. c., 32 N. E. Rep., 300. (*Held*, that it was insufficient to allege, that defendant had no property subject to execution at the time the action was commenced, or at the time an execution was issued.) *Petree v. Brotherton*, *supra*. (A subsequent creditor may maintain action, where he alleges and proves that the conveyance was made for the purpose of defrauding subsequent, as well as existing creditors.) *Huffmaster v. Ogden*, 135 Ind., 661; s. c., 35 N. E. Rep., 512. (Complaint held to be demurrable for failing to allege that debtor's grantee participated in the fraud; and also on the ground that it did not allege that the debtor had no other property from which plaintiff's judgment could be satisfied.) *Wilson v. Boone*, 136 Ind., 142; s. c., 35 N. E. Rep., 1096. (In an action by an administrator to set aside a conveyance by deceased to his wife, the complaint must allege that the conveyance did not leave deceased enough to pay his debts; that it was made with the intent to defraud his creditors, as the wife knew, or without valuable consideration.) *National State Bank v. Vigo County Nat. Bank*, Ind., 1895, 40 N. E. Rep., 799. (Complaint must allege that the conveyance was executed with a fraudulent intent.) *Roberts v. Farmers' and Merchants' Bank*, Ind., 1894, 36 N. E. Rep., 123; *id.*, 1091. (Where complaint alleges that grantee was a party to the fraud, it

need not show that the conveyance was without consideration.) *S. P. Slagel v. Hoover*, 137 Ind., 314; s. c., 36 N. E. Rep., 1099; *York v. Rockwood*, 132 Ind., 358; s. c., 31 N. E. Rep., 1110. (In an action against a grantee who gave no consideration, it is not necessary to allege or prove notice to him of grantor's fraudulent intent.) *Michigan*.—*Dunsback v. Collar*, 95 Mich., 611; s. c., 55 N. W. Rep., 435. (In an action to set aside a voluntary conveyance, grantor's insolvency held to be sufficiently stated by an allegation that he had "no real or personal estate liable to levy and sale, excepting the premises aforesaid, on which the sheriff could make a levy.") *Missouri*.—*Mullen v. Hewett*, 103 Mo., 639; s. c., 15 S. W. Rep., 924. (A bill alleging a number of distinct conveyances to different grantees, but showing no common purpose or design, held to be demurrable as multifarious.) *New York*.—*Fuller v. Brown*, 76 Hun, 557; s. c., 58 State Rep., 249; 28 N. Y. Supp., 189. (Complaint held to be sufficient, which alleged that a deed was made without consideration with intent to hinder, delay and defraud the grantor's creditors, and particularly the plaintiff, and to prevent plaintiff or any other creditor from levying on the property, and the grantor was possessed of no other property out of which plaintiff's demand could be satisfied. It is not necessary in such a case, to allege that the grantor had no other property at the time of the conveyance.) *Stafford v. Merrill*, 62 Hun, 144; s. c., 41 State Rep., 230; 16 N. Y. Supp., 467. (The omission to charge a fraudulent intent in making an assignment for the benefit of creditors is not fatal, where facts are alleged which show the assignment to be fraudulent in law, because of excessive preferences therein.) *Pittsfield Nat. Bank v. Tailer*, 14 N. Y. Supp., 557; s. c., 38 State Rep., 895. (A complaint alleging that the assignment was null and void on its face and that it was made with the intent to hinder, delay and defraud creditors does not contain two causes of action, which should be separately stated and numbered.) *Durant v. Pierson*, 8 N. Y. Supp., 904; s. c., 29 State Rep., 510. (Complaint held to be sufficiently definite and certain, which alleged that the assignment was fraudulent and void, and made and accepted with the intent to defraud creditors, without further averring the facts relied on to establish the intent.) *McQueen v. New*, 10 Misc., 251; s. c., 30 N. Y. Supp., 977; 63 State Rep., 232. (The words "fraudulent and void," when stated not as facts, but as inferences, are not admitted by demurrer.) *North Carolina*.—*Smith v. Summerfield*, 103 N. C., 284; s. c., 12 S. E. Rep., 997. (In an action by creditors to establish their claims and to set aside a fraudulent assignment, it is not necessary to attach copies of the deeds of assignment to the complaint.) *North Dakota*.—*Paulson v. Ward*, N. Da., 1894, 58 N. W. Rep., 792. (Grantors' fraud held to be sufficiently shown by a complaint alleging that they were insolvent, and were being pushed by their creditors, and that the conveyance was without consideration, and wholly voluntary, and made with the intent to hinder, delay and defraud the creditors of grantors.) *South Carolina*.—*McGahan v. Crawford*, South Carolina, 1893, 17 S. E. Rep., 561. (In an action to set aside as an illegal preference a conveyance made within ninety days before a general assignment, the petition was held to be demurrable for failing to allege that the grantee was creditor.)

South Dakota.—Probert v. McDonald, 2 S. Da., 495; s. c., 51 N. W. Rep., 212. (It is sufficient to allege generally that the conveyance was made with the intent to delay and defraud the grantor's creditors.) *United States*.—Kittel v. Agusta, etc., R. Co., 65 Fed. Rep., 859. (Allegations, not that the acts were fraudulently done, but that they were done with intent to defraud, is sufficient.) Pullman v. Stebbins, 51 Fed. Rep., 10. (Bill charging several distinct conveyances to be all the part of one scheme to deprive plaintiff of the power to collect his claim, held not to be multifarious.) *Washington*.—Wagner v. Law, 3 Wash. St., 500; s. c., 28 Pac. Rep., 1109. (In an action by a judgment creditor to quiet the title to land fraudulently conveyed, which he had purchased in at execution sale, held, that the complaint was fatally defective in failing to allege that the debtor had not other property subject to execution at the time the conveyance was made.) *Wisconsin*.—Marston v. Dresden, 76 Wis., 418; s. c., 45 N. W. Rep., 110. (A complaint describing as separate causes of action five distinct transfers of realty, held to set out but one cause of action.) Marston v. Dresden, *supra*. (Fraud held to be sufficiently shown by allegations, that defendant owned certain property when the debt was contracted, that he transferred it to his wife without consideration, and that he was heavily in debt when he did so.)

(4) *Exhaustion of legal remedies, issuing of execution, etc.*

Alabama.—Jones v. Smith, 92 Ala., 455; s. c. 9 So. Rep., 179. (In a bill under the Code, § 3544, providing that a creditor without a lien may file his bill to subject to his debt property fraudulently conveyed,—it is not necessary to allege that there has been an issue and return of execution on the judgment sought to be enforced.) *Illinois*.—Quinn v. People, Saline Co., 146 Ill., 275; s. c. 34 N. E. Rep., 148. (An allegation that executions have been issued on the judgment, and returned unsatisfied, is sufficient to show that complainant has exhausted his legal remedies.) *Indiana*.—Line v. State, 131 Ind., 468; s. c. 30 N. E. Rep., 708. (Demurrer should be sustained, where complaint fails to show that the alleged fraudulent grantor had no property subject to the execution at the time the suit was commenced.) *Kentucky*.—Mansfield v. Wilkinson, Ky., 1894, 27 S. W. Rep., 808. (Exhaustion of legal remedies is not shown by an allegation that no transcript of the judgment has been filed, and no execution sued out thereon because the debtor had no land other than that sought to be sold.) *Minnesota*.—Scanlan v. Murphy, 51 Minn., 596; s. c. 55 N. W. Rep., 799. (Plaintiff need not show that he has followed his legal remedy further than to recover and docket his judgment.) *Missouri*.—Mullen v. Hewett, 103 Mo., 639; s. c. 15 S. W. Rep., 924. (Where it appears that plaintiff has permitted his judgment to become dormant, a demurrer will be sustained; until plaintiff has sued on the judgment, renewed it, issued execution, etc., he has not exhausted his legal remedies.) *New York*.—Citizen's Nat. Bank v. Hodges, 80 Hun, 471; s. c. 62 St. Rep., 278; 30 N. Y. Supp., 445. (Where complaint alleges a fraudulent intent on defendants part, it need not allege that plaintiffs were remediless because defendants had disposed of all their property.) Citizen's Nat. Bank v. Hodges, *supra*. (Held, that it was sufficient to allege, "that thereafter and on the same day

an execution upon such judgment was duly issued to the Sheriff of said S. County, where said defendants then resided, and yet reside, which execution was thereafter and before the commencement of this action duly returned by said Sheriff unsatisfied, and said judgment still remains wholly unpaid and unsatisfied;" and that the kind of execution and against whom it was issued could be shown by evidence thereunder.) *Rhode Island*.—*Stone v. Westcott*, R. I., 1894, 28 Atl. Rep., 662. (Demurrer sustained, where the bill did not allege that the execution had been issued on plaintiff's judgment and returned unsatisfied.) *South Carolina*.—*Miller v. Hughes*, 33 S. C., 580; s. c. 12 S. E. Rep., 419. (Where complaint seeks to set aside a conveyance for actual moral fraud, committed by collusion of parties thereto, a failure to allege that plaintiff has recovered judgment, and obtained a return of *nulla bona* on his execution, does not render such complaint demurrable.) S. P. *Meinhard v. Youngblood*, S. C., 1892, 15 S. E. Rep., 950. *Texas*.—*Meier v. Waco St. Bank*, Texas Civ. App., 1894, 27 S. W. Rep., 881. (A bill is bad on demurrer if it fails to show that the creditor has exhausted all his legal remedies.) *United States*.—*Morrow Shoe Manuf. Co. v. New England Shoe Co.*, 6 C. C. A.—, 57 Fed. Rep., 685. (Bill to set aside a fraudulent conveyance must allege that plaintiff prosecuted his claim to judgment and had an execution issued thereon which has been returned unsatisfied;) Following *Scott v. Neely*, 140 U.S., 106; 11 Supm. C. Rep., 712; *Cates v. Allen*, 149 U.S., 451; 13 Supm. C. Rep., 883; S. P. *Kittel v. Augusta, etc.*, R. Co., 65 Fed. Rep., 859. *Washington*.—*O'Leary v. Duvall*, Wash., 1895, 39 Pac. Rep., 163. (The fact that debtor had no other property out of which an execution could be satisfied, held to be sufficiently shown by an allegation that the land conveyed was all the property the debtor owned and that an execution against him had been returned *nulla bona*.) *Whitehouse v. Point Defiance, etc.*, R. Co., Wash., 1894, 38 Pac. Rep., 152. (In an action to set aside a fraudulent conveyance as to creditors, an allegation that the vendor has more judgments rendered against it than it can pay sufficiently shows that it has no other property out of which judgment can be collected.) *Wisconsin*.—*Pierstoff v. Jorge*, 86 Wis., 128; s. c. 56 N. W. Rep., 735. (An allegation that on a day named an execution was "in due form" issued against defendant and returned wholly unsatisfied, is sufficient to show that a legal execution has been issued.) *Daskam v. Neff*, 79 Wis., 161; s. c. 47 N. W. Rep., 1132. (Complaint must show the exhaustion of plaintiff's legal remedies, but there need not be a distinct allegation that the debtor has no other property than that sought to be subjected.)

COMPLAINTS IN ACTIONS FOR ABSOLUTE OR LIMITED DIVORCE.

[Principal Case, p. 333, this Vol.]

Alabama.—*Farley v. Farley*, Ala., 1892, 10 So. Rep., 646. (Marriage held to be sufficiently stated by an allegation that on a specified day, complainant, "whose maiden name was A. B., was lawfully and legally

married unto X. Y.") *Id.* (It is sufficiently certain to allege that "defendant has been guilty of adultery with divers parties and persons whose names are unknown to your oratrix.") *California*.—*Forney v. Forney*, 80 Cal., 528; s. c., 22 Pac. Rep., 294. (Complaint held to be sufficient, which alleged in the language of Civ. Code, § 106, that defendant's intemperance was such "as would reasonably inflict a course of great mental anguish" upon plaintiff); *S. P., Reading v. Reading*, 96 Cal., 4; s. c., 30 Pac. Rep., 808. *Johnson v. Johnson*, Cal., 1894, 35 Pac. Rep., 637. (Demurrer overruled, where complaint alleged that "about three years ago" defendant, without cause, struck plaintiff, and since then, has continually, whenever they have been together, used vile language to plaintiff.) *Colorado*.—*Calvert v. Calvert*, 15 Colo., 390; s. c., 24 Pac. Rep., 1043. (Willful desertion without any reasonable cause for the space of one year held to be sufficiently charged by a complaint, alleging that for more than one year, and up to the time of action, defendant continuously absented herself from home and refused to live with plaintiff, and still did so without any fault on plaintiff's part; and that the desertion became completed while plaintiff was a resident of the state.) *Indiana*.—*Polson v. Polson*, Ind., 1895, 39 N. E. Rep., 498. (Complaint held to sufficiently show defendant's conviction of an infamous crime, which alleged that defendant "was convicted of the crime of rape upon a little girl, the daughter of plaintiff.") *Kansas*.—*Winterbury v. Winterbury*, 52 Kan., 406; s. c., 34 Pac. Rep., 971. (The acts relied on to constitute cruelty should be alleged.) *Callen v. Callen*, 44 Kan., 370; s. c., 24 Pac. Rep., 360. (It is error to overrule a motion to make the petition more definite and certain, where it merely alleges, "that during the time the defendant lived with plaintiff as his wife, he was guilty of gross neglect of duty and extreme cruelty towards the plaintiff.") *Minnesota*.—*Grant v. Grant*, 53 Minn., 181; s. c., 54 N. W. Rep., 1059. (Facts which would entitle plaintiff to a limited divorce may be joined in a complaint with those justifying an absolute divorce, and relief may be sought thereon in the alternative.) *Missouri*.—*Collins v. Collins*, 53 Mo. App., 470. (Petition should allege plaintiff's continuous residence in the state for at least a year.) *Gant v. Gant*, 49 *Id.*, 3. (It is not necessary for the petition to allege that plaintiff is a resident of the county in which the action is brought.) *New Jersey*.—*Lutz v. Lutz*, N. J. Eq., 1894, 28 Atl. Rep., 315. (Where condonation is interposed as a defense, an amended petition may be filed charging defendant with acts of adultery subsequent to the alleged condonation, and subsequent to the commencement of the action.) *Chadwick v. Chadwick*, N. J. Eq., 1894, 28 Atl. Rep., 1051. (Where the only cruelty charged is the use of abusive and filthy language, gross abuse of marital rights is not available.) *New York*.—*Carpenter v. Carpenter*, 17 N. Y. Supp., 195; s. c., 43 State Rep., 577. (Plaintiff will not be required to give a bill of particulars where complaint alleges that defendant is living "in adulterous intercourse" with a woman.) *Halsted v. Halsted*, 7 Misc., 23; s. c., 27 N. Y. Supp., 406. (Additional acts of adultery committed since the commencement of the action cannot be set up by supplemental complaint); *S. P. Neiberg v. Neiberg*, 31 Abb. N. C., 257; s. c., 8 Misc., 97; 28 N. Y. Supp., 1005.

North Carolina.—O'Conner v. O'Conner, 109 N. C., 189; s. c., 13 S. E. Rep., 887. (Complaint must explicitly show that the personal violence complained of was not due to any provocation on plaintiff's part.) *Sheete v. Sheetz*, 104 N. C., 631; s. c., 10 S. E. Rep., 707. (A husband, seeking a divorce on the ground of adultery, need not allege that it has not been due to his fault, or that he has not himself been guilty thereof.) *Jackson v. Jackson*, 105 N. C., 433; s. c., 11 S. E. Rep., 173. (Complaint should have been dismissed, which merely alleged that defendant "became violently jealous of her, the said plaintiff, and began to treat her cruelly and barbarously so as to endanger her life; frequently at night, when no other person in the house was awake, shaking his fist and threatening to mash her brains out.") *Oklahoma*.—Irwin v. Irwin, Okl., 1894, 37 Pac. Rep., 548. (Complaint held not to be demurrable, which alleged "that on or about February, 1892, and on divers other occasions prior and subsequent thereto, defendant was guilty of cruel and inhuman treatment of the plaintiff in this, to wit, slapped said plaintiff; that for a long time past said defendant cursed and abused said plaintiff by calling her vile names; and that defendant fails and refuses and neglects to provide for the plaintiff and her children according to his station in life.") *Pennsylvania*.—Melvin v. Melvin, 130 Pa. St., 6; s. c., 18 Atl. Rep., 920. (Libelant may be permitted to amend her bill of particulars by adding allegations that respondent had charged her with infidelity.) *Texas*.—Morey v. Morey, 82 Tex., 308; s. c., 17 S. W. Rep., 838. (Petition held to be sufficiently definite and certain, which alleged that plaintiff for more than six months had been a bona fide citizen of the state, and that defendant resided in Massachusetts; that plaintiff and defendant were married in New Hampshire, and lived together as man and wife in Massachusetts until 1880, when defendant voluntarily, without cause, abandoned plaintiff with the intention of finally separating from him, and continued to live apart from him up to the filing of the petition.) *Andrews v. Andrews*, 75 Tex., 609; s. c., 12 S. W. Rep., 1124. (Demurrer properly sustained, where petition failed to show that there had been a marriage previous to the filing of the petition.) *Hanna v. Hanna*, 3 Tex. Civ. App., 51; s. c., 21 S. W. Rep., 720. (Evidence that defendant communicated a venereal disease on other occasions than those charged in the bill held to be admissible on the ground that it tended to show the extent of defendant's alleged excesses and cruel treatment.) *Washington*.—Burdick v. Burdick, 7 Wash., 533; s. c., 35 Pac. Rep., 415. (Though the last act of adultery was not alleged to have been committed within one year before the action, nor that it was unforgiven, if proof of both facts were given, a judgment by default will not be reversed.) *Scoland v. Scoland*, 4 Wash., 118; s. c., 29 Pac. Rep., 930. (Acts of cruelty occurring subsequent to the commencement of the action may be set up by supplemental complaint.)

COMPLAINTS IN ACTIONS TO FORECLOSE MECHANIC'S LIENS.

[Principal Case, p. 339, this Vol.]

- (1) *The contract for building or materials, notice to owner of sub-contractor's claim, etc.*
 - (2) *Notice of lien, its filing, etc.*
 - (3) *The premises affected, etc.*
- (1) *The contract for building or materials, notice to owner of sub-contractor's claim, etc.*

Alabama.—*Lee v. Wimberly*, Ala., 1894, 15 So. Rep., 444. (The variance is fatal, where complaint alleges a sale of material to the contractor and owner, and the evidence shows a sale to the contractor only.) *Arkansas.*—*McFadden v. Stark*, 58 Ark., 7; s. c., 22 S. W. Rep., 884. (In an action by a sub-contractor, an allegation of the giving of notice to the owner of the premises of plaintiff's claim is material, and it is error to strike such allegation out of the complaint.) *California.*—*Gancy v. Morton*, 94 Cal., 558; s. c., 29 Pac. Rep., 1111. (Under Code Civ. Pro., Sec. 1183, 1184, a material man need not plead the construction contract and its invalidity, but may plead that the goods were sold at the special request of the owner, the contract and its invalidity being matters of evidence.) *La Grille v. Mallard*, 90 Cal., 373; s. c., 27 Pac. Rep., 294. (Held, that an allegation, that defendant promised to pay "the reasonable value" of said labor and material, indicated a sufficient consideration to render the contract valid.) *Booth v. Pendola*, 88 Cal., 36; s. c., 25 Pac. Rep., 1101. (The value of the materials furnished, and the work done, must be alleged and proved.) *West Coast Lumber Co. v. Newkirk*, 80 Cal., 275; s. c., 23 Pac. Rep., 231. (Where complaint alleges that the building was constructed with the owner's knowledge, it need not allege that the owner did not give notice that he would not be responsible for the work.) *Jewell v. McKay*, 82 Cal., 144; 23 Pac. Rep., 139. (Complaint is not ambiguous and uncertain because it fails to state the nature of the alterations and repairs done, or whether the various lien holders separately or jointly contributed to the work.) *Castaguinio v. Ballatta*, 82 Cal., 250; s. c., 23 Pac. Rep., 127. (Evidence of a special contract and defendant's acceptance of the work done under it is admissible under the common counts.) *Wagner v. Hansen*, 103 Cal., 104; 37 Pac. Rep., 195. (Where complaint and claim of lien state that the work was done for an agreed price, and the evidence shows that no price was agreed upon, the variance is fatal.) *Palmer v. Lavigne*, 104 Cal., 80; 37 Pac. Rep., 775. (A claim and notice stating that the contract was made with the wife, is inadmissible in evidence, under a complaint alleging that it was made with both husband and wife.) *Cohn v. Wright*, 89 Cal., 86; s. c., 26 Pac. Rep., 643. (The complaint should directly allege that the materials were furnished to be used in the construction of the building upon which the lien is claimed.) *S. P. Reed v. Norton*, 90 Cal., 590; s. c., 26 Pac. Rep., 767. *Russ Lumber & Mill Co. v. Garrettsen*, 87 Cal., 589; s. c., 25 Pac. Rep., 747. (It is sufficient for a material man to aver, that

due notice was given the owner of the amount, and value of the materials to be furnished contractor.) *Colorado*.—*Arkansas, etc., Canal Co. v. Nelson*, 4 Colo. App., 438; s. c. 36 Pac. Rep., 807. (Complaint held to be insufficient to sustain a judgment by default, which merely alleged an indebtedness "for work and labor performed by the plaintiff along the line of, and upon, defendant's canal," without otherwise specifying the nature of the work.) *Ditto v. Jackson*, 3 Colo. App., 281; s. c., 33 Pac. Rep., 81. (Demurrer to a complaint of a sub-contractor overruled, where it contained averments implying that the owner was indebted to the principal contractor.) *Indiana*.—*Adamson v. Shaner*, 3 Ind. App., 448; s. c., 29 N. E. Rep., 944. (Demurrer overruled, where sub-contractor's complaint alleged that the contractors employed him to plaster the building, etc., which he did, and that it was worth a specified sum.) *Adamson v. Shaner, supra*. (Notice of sub-contractor to owner, that he will hold him liable must be filed with complaint.) *Leeper v. Myers*, 10 Ind. App., 314; s. c., 37 N. E. Rep., 1070. (Complaint alleging that plaintiff sold material "to be used" in the erection of a certain house, that they notified defendant that they "were furnishing" the material for the house, and that a bill of particulars of the material "so furnished and used," is filed,—sufficiently alleges that the material was used in the house.) *Kansas*.—*Jarvis Conklin Mortg. Trust Co. v. Sutton*, 46 Kan., 166; s. c., 26 Pac. Rep., 406. (Petition held to sufficiently show that the materials were furnished under a contract with the owner, where such fact only appeared from the statement of lien attached to the petition.) *Massachusetts*.—*Batchelder v. Hutchinson*, 161 Mass., 462; s. c., 37 N. E. Rep., 452. (Petition held to be bad, which failed to state that the person, other than the owner, who made the agreement with plaintiff was authorized by the owner to make it.) *Missouri*.—*Rall v. McChary*, 45 Mo. App., 365. (Petition held not to be fatally defective, because it failed to allege that the material went into the building, where it does allege that the materials were furnished the owner for any building, etc., on the property.) *Grace v. Nesbit*, Mo., 1892, 18 S. W. Rep., 1118. (Omission to allege that the materials were used in the construction of the building, held, to be cured by an allegation in the answer that they were so used.) *Nebraska*.—*Pomeroy v. White Lake Lumber Co.*, 33 Neb., 240; s. c., 49 N. W. Rep., 1131. (Held, that the fact that the materials furnished were used in the construction of the building was to be inferred from the allegation, that "in pursuance of said verbal contract the plaintiff furnished said material to the said defendant W. for the erection of said house," on or between specified dates, for a sum named.) *Stewart-Chute Lumber Co. v. Missouri Pac. Lumber Co.*, 28 Neb., 39; s. c., 44 N. W. Rep., 47. (Held, that one who furnished material for the construction of a railway to a sub-contractor, need not allege, or prove, the actual application of such material to the purpose intended.) *New York*.—*Breuchaud v. Mayor, etc., of N. Y.*, 61 Hun, 564; s. c., 41 State Rep., 158; 16 N. Y. Supp., 347. (A complaint setting up a mechanic's lien against N. Y. City for labor or materials furnished a contractor, must allege the terms of the contract between the contractor and city, and show the existence of cause of action thereon in favor of the contractor, at the time when the plaintiff

sets up his lien.) *Kruger v. Braender*, 3 Misc., 275; s. c., 23 N. Y. Supp., 324. (Variance held to be immaterial, where it was alleged that plaintiff furnished materials under a joint contract with contractor and owner and the proof showed only a several contract with the owner.) *Ross v. Simon*, 30 State Rep., 545; s. c., 9 N. Y. Supp., 536. (*Held*, that a demurrer should not be sustained to a complaint, which showed that plaintiff did part of the work on a building erected by a lessee, and that the building was erected with the owner's knowledge and consent, without setting forth how or under what circumstances, the consent of the owner was given.) *Pennsylvania*.—*Bohem v. Seabury*, 141 Pa., 594; s. c., 21 Atl. Rep., 674. (A mechanic's lien cannot be sustained for a portion of the work called for by an entire contract, there being no averment of the completion of the contract, or that the owner had prevented the completion.) *Texas*.—*Ricker v. Schadt*, 5 Tex. Civ. App., 460; s. c., 23 S. W. Rep., 907. (The action of a sub-contractor cannot be maintained, where his petition shows that at the time he gave the owner notice of his claim the latter owed nothing to the contractor, who had abandoned his work.) *Utah*.—*Teahen v. Nelson*, 6 Utah, 363; s. c., 23 Pac. Rep., 764. (The complaint of a sub-contractor should allege the amount due the contractor, less any payment made for labor and materials furnished before plaintiff's lien attached.)

(2) *Notice of lien, its filing, etc.*

Alabama.—*Cook v. Rome Brick Co.*, Ala., 1893, 12 So. Rep., 918. (Complaint is bad if it fails to show that the debt accrued within four months prior to the filing of the statement of lien.) *Colorado*.—*Hanna v. Colorado Sav. Bk.*, 3 Colo. App., 28; s. c., 31 Pac. Rep., 1020. (Demurrer sustained to a complaint setting out a defective statement of claim.) *Illinois*.—*Boals v. Intrup*, 40 Ill. App., 62. (Demurrer sustained, where petition failed to allege the filing of statement of lien.) *Rittenhouse v. Sable*, 43 Ill. App., 558. (Bill held to be demurrable, which showed on its face that the lien was not filed within the time prescribed by statute, and which did not allege any excuse for not filing it in time.) *Indiana*.—*Hubbard v. Moore*, 132 Ind., 178; s. c., 31 N. E. Rep., 534. (Where the bill of particulars showed that some of the items were furnished less than 60 days before the notice of lien was filed, held that complaint was sufficient after judgment, though it failed to allege that notice was filed within 60 days after the materials were furnished.) *Minnesota*.—*Hurlbert v. New Ulm Basket Wks.*, 47 Minn., 81; s. c., 49 N. W. Rep., 521. (Demurrer sustained, because complaint failed to show that the lien was filed within the period limited by statute therefor); *S. P., J. D. Morgan Manuf. Co. v. Clarke*, Minn., 1894, 61 N. W. Rep., 556. *Glass v. St. Paul Carriage, etc., Co.*, 43 Minn., 228; s. c., 45 N. W. Rep., 150. (As against a motion to strike out averment, it was held sufficient to allege, that, for the purpose of securing a lien on the premises, plaintiffs duly made an account in writing of the items of materials sold, and of the value of the same, to which oath was duly made on a certain day, and that the same, with a copy of the written contract, was duly filed and recorded, on a day named, in the office of the register of deeds for the county in which the premises were situated.) *Missouri*.—

Twitchell v. Devens, 45 Mo. App., 283. (Plaintiff need not allege or prove that he commenced his suit within 90 days after filing the lien. He should prove the time of filing the lien, and the petition will show its own filing.) *McDermott v. Claas*, 104 Mo. 14; s. c., 15 S. W. Rep., 995. (A sub-contractor's petition stated who the contractor was; that he was indebted to plaintiff; that plaintiff notified the owner that he claimed a lien for such indebtedness, stating the amount and when it was due; and that he afterwards filed a just and true account of the demand so due him. *Held*, that petition sufficiently alleged the filing of account in accordance with statute.) *New Mexico*.—*Minor v. Marshall*, N. Mex., 1891, 27 Pac. Rep., 481. (Demurrer sustained, where bill set out a copy of notice of claim which was insufficient on its face.) *New York*.—*Schillinger, etc., Asphalt Co. v. Arnott*, 14 N. Y. Supp., 326. (Notice of lien in conformity with statute must be shown.) *Oregon*.—*Pilz v. Killingsworth*, 20 Ore., 432; s. c., 26 Pac. Rep., 305. (Demurrer to complaint sustained, which merely alleged that the notice of lien was duly made out and filed; the complaint should affirmatively show that the notice contained all the essential provisions required by statute.) *South Carolina*.—*Waring v. Miller Batting & Manuf. Co.*, 1892, 15 S. E. Rep., 132. (Plaintiff may be allowed to amend his petition so as to allege that the statement of lien was properly filed.) *South Dakota*.—*Rust-Owen Lumber Co. v. Fitch*, 3 S. D., 213; s. c., 53 N. W. Rep., 879. (An allegation that the verified account required by statute was filed on a specified date, taken in connection with allegations of the date when the materials were delivered, held, to sufficiently show that the account was filed within the time prescribed.)

(3) *The premises affected, etc.*

California.—*Willamette Steam Mills Co. v. Kremer*, 94 Cal., 205; s. c., 29 Pac. Rep. 633. (The lien cannot be enforced against land, other than that occupied by building or the ground that it is convenient to the use thereof, unless the complaint contains appropriate allegations.) *Willamette Steam Mills Co. v. Kremer*, *supra*. (Where complaint alleges that the building was erected on lot 6 and proof shows it to have been erected partly on lots 6 and 7, sale can only be decreed as to lot 6.) *Florida*.—*St. Johns, etc., R. Co. v. Bartola*, 28 Fla., 82; s. c., 9 So. Rep., 853. (It is error to render a decree for a larger sum than is alleged in the bill to be due, and specially asked for in the prayer for relief.) *Michigan*.—*Steel Brick-Siding Co. v. Muskegon Mach., etc. Co.*, 98 Mich., 616; s. c., 57 N. W. Rep., 817. (Claims and interests of defendants held to be sufficiently stated by allegations, that a receiver for the principal defendant had been appointed, and that such receiver claimed an interest in the premises; and that the other defendants appeared from the records in the office of the register of deeds, to have, or to claim, rights in the premises, as subsequent purchasers, mortgagees, lien claimants, or otherwise.) *New Mexico*.—*Post v. Miles*, N. Mex., 1893, 34 Pac. Rep., 586. (Bill held not to be demurrable, because it showed that the improvement belonged to one person and the land to others, where all were made parties.) *Oregon*.—*Joshua Hendy Mach. Works v. Pacific Cable Coast Co.*, 24 Ore., 152; s. c., 33 Pac. Rep., 403. (If the notice of lien introduced does not describe

the same property as that set forth in the complaint, the variance is fatal.) *Rhode Island*.—*Spencer v. Doherty*, 17 R. I., 89; s. c., 20 Atl. Rep., 282. (A petition is defective, but may be amended, which fails to allege the particulars of petitioner's account, and while it prays a lien against the entire property, it admits that defendant is only owner of an undivided interest.) *Texas*.—*Lignoski v. Crooker*, Tex. Civ. App., 1893, 22 S. W. Rep., 774. (Defendant's ownership of the property described, held to be sufficiently stated by an allegation that plaintiffs agreed to furnish defendants with the labor and materials necessary in the construction of the building "on the property of defendants.")

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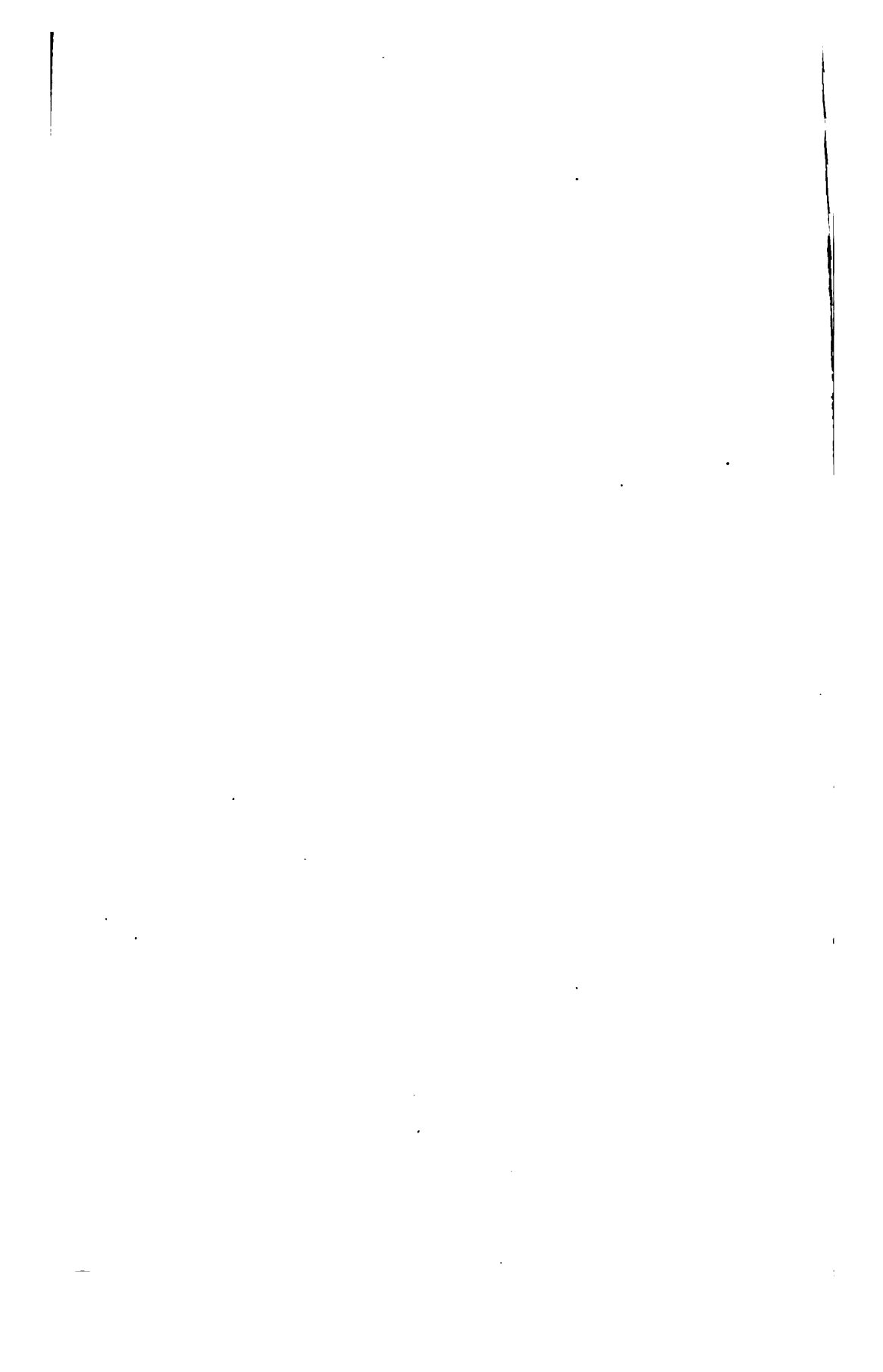
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* Criticized.

† Objectionable.

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